Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX
Vol. II
Pages 596a to 789a

In The

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-452, 77-457, 77-551, 77-602

MOBIL ALASKA PIPELINE COMPANY, EXXON PIPELINE COMPANY, BP PIPELINES INC. and ARCO PIPE LINE COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED SEPTEMBER 22, OCTOBER 12, OCTOBER 25, 1977

CERTIORARI GRANTED NOVEMBER 28, 1977

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DATE	
7/ 6/77	Petition for Review of Order of ICC—*Mobil Alaska*
7/ 6/77	Flg. Petitioner's Application for Temporary Restraining Order—*Mobil Alaska*
7/ 6/77	Flg. Petitioner's Application for Interlocutory Injunction—*Mobil Alaska*
7/ 6/77	Flg. Petitioner's Memorandum in Support of their Applications for Interlocutory Injunction and Temporary Restraining Order—*Mobil Alaska*
7/ 8/77	Petition for Review of Order of ICC—*BP Pipelines*
7/11/77	Motion to Intervene of Sohio Pipe Line Co.—*Mobil Alaska*
7/11/77	Flg. Memorandum of Sohio Pipe Line Co. in Support of Petitioner's Application for Temporary Restraining Order—*Mobil Alaska*
7/11/77	Petition for Review of Order of ICC—*Exxon Pipeline*
7/11/77	Flg. Petitioner's Motion to Stay, Restrain and Suspend Order of I.C.C.—*BP Pipelines*
7/11/77	Flg. Petitioner's Memorandum in Support of Their Motion to Stay, Restrain and Suspend Order of I.C.C.—*BP Pipelines*
7/12/77	Flg. Motion of Exxon Pipeline Co. for Expedited Consideration or, in the Alternative, for a Stay Pending Review, a Memorandum in Support and Appendices to Memorandum in Support—*Exxon Pipeline*
7/12/77	Flg. Motion of State of Alaska for Leave to Appear as Party Pursuant to 28 U.S.C. § 2323, and § 2348, and Rule 15 of FRAP—*Mobil Alaska*
7/12/77	Flg. Reply of I.C.C. in Opposition to Petitioner's Applications for Interlocutory Injunction and Temporary Restraining Order—*Mobil Alaska*

DATE	
7/13/77	Petition for Review of Order of ICC—*ARCO Pipe Line*
7/13/77	Flg. Reply of Respondent, I.C.C., in Opposition to Petitioner's Motion to Stay, Restrain and Suspend Order of I.C.C.—*BP Pipelines*
7/13/77	Flg. Memorandum in Support of Motion of Respondent, U.S.A., to Dismiss Appeal—*Mobil Alaska*
7/13/77	Flg. Memorandum of U.S.A. in Opposition to Applications for Temporary Restraining Order and Interlocutory Injunction—*Mobil Alaska*
7/13/77	Flg. Memorandum of State of Alaska in Opposition to Applications for Interlocutory Injunction and Temporary Restraining Order—*Mobil Alaska*
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7/14/77	Flg. Memorandum of Arctic Slope Regional Corp. in Opposition to Application for Interlocutory Judgment and Temporary Restraining Order—*Mobil Alaska*
7/14/77	Motion for Injunction [with Memorandum in Support] of ARCO Pipe Line Co.—*ARCO Pipe Line*
7/14/77	Flg. Motion of Respondent, U.S.A., for Consolidation of Nos. 77-2412, 77-2421 and 77-2437 and to Dismiss Petitions —*all cases*
7/14/77	Flg. Telegram Confirmation of Interstate Commerce Commission as Requested by the Ct. with respect to earliest date projected for arrival of oil through pipeline to Valdez—*Mobil Alaska*
7/14/77	Flg. Telegram Confirmation of Mobil Alaska Pipeline Co. as Requested by Ct. with respect to earliest date projected for arrival of oil through pipeline to Valdez—*Mobil Alaska*
7/14/77	Flg. Telegram Confirmation of Exxon Pipeline Co. as Requested by Ct. with respect to earliest date projected for arrival of oil through pipeline to Valdez—*Exxon Pipeline*

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7/14/77 Flg. Telegram Confirmation of ARCO Pipe Line Co. as Requested by Ct. with respect to earliest date projected for arrival of oil through pipeline to Valdez—*ARCO Pipe Line*

7/15/77 Flg. Memorandum of U.S. in Support of Their Motion to Dismiss, also fld. in Nos. 77-2412, 77-2421, and 77-2437—*all cases*

7/18/77 Flg. Mobil Alaska's Reply Memorandum in Support of Application for Temporary Restraining Order and Interlocutory Injunction and Response to Motion to Dismiss. (Copies were mailed directly to Judges' home stations.)—*Mobil Alaska*

7/18/77 Flg. Motion of Amerada Hess for Entry of Appearance as a Party—*Mobil Alaska*

7/18/77 Flg. Exxon's Reply to Motion of USA for Consolidation and Motion to Dismiss (Copies sent directly to Judges' home stations.)—*Exxon Pipeline*

7/19/77 Flg. Reply of ICC in Opposition to ARCO's Application for Interlocutory Injunction, and Exxon's Motion for Expedited Consideration (Copies sent directly to judges' home stations.)—*ARCO Pipe Line and Exxon Pipeline*

7/19/77 Flg. State of Alaska's Supplemental Memorandum in Opposition to Application for TRO and Interlocutory Injunction and in Support of Motion to Dismiss filed by Respondent U.S. (Copies sent directly to home stations.)—*all cases*

7/19/77 Minute Entry: Oral arguments were held in Houston, Texas today on Cases 77-2392, 77-2412, 77-2421 and 77-2437 on the motion to dismiss, temporary restraining order and injunctive relief. The Court granted from the bench the motion to consolidate these cases as well as the motions of all parties to intervene. The motion to dismiss and temporary restraining order and injunctive relief motions were taken with the case. The Panel consisted of Judges Brown, Godbold and Roney. Arguing for Petitioners were: 1) Andrew J. Kilcarr (Mobil Alaska); 2) Richard

DATE

J. Flynn (Exxon); 3) Marvin Schwartz (BP) and 4) Robert Jordan who handled the rebuttal (for ARCO). Arguing for Respondents were: 1) Charles H. White, Jr. (ICC); 2) Donald A. Kaplan (D. of Justice); 3) Avrum Gross (Atty. Gen., Alaska) and 3) Yale Lewis (Arctic Slope)—*Mobil Alaska*

7/22/77 Flg. Suppl. Memorandum of State of Alaska in Opposition to Memorandum in Support of Petition fld. by Intervenor, Amerada Hess Pipeline Corp.—*all cases*

7/25/77 Flg. Motion of Union Alaska Pipeline Company to Appear as a Party—*Mobil Alaska and Exxon Pipeline*

7/29/77 Opinion of Court of Appeals dismissing cases: all motions to intervene granted; all motions for stay, suspension, injunction, etc. denied—*all cases*

8/15/77 Petition for Rehearing En Banc—*BP Pipelines*

8/17/77 Received certified list of all documents submitted to ICC—*all cases*

8/19/77 Flg. Petitioner's Motion for Stay of Mandate Pending Application for Certiorari—*Exxon Pipeline*

8/19/77 Flg. Petitioner's Motion for Stay of Order of Interstate Commerce Commission pending application for certiorari—*Exxon Pipeline*

8/25/77 Flg. Response of Respondent, I.C.C., in Opposition to Motion for Stay of Order of I.C.C. pending application for certiorari—*Exxon Pipeline*

8/29/77 Flg. Memorandum of Respondent, U.S.A., in Opposition to Motion for Stay—*Exxon Pipeline*

9/ 1/77 Flg. Response of State of Alaska in Opposition to Motions of Exxon Pipeline Co. for Stay of Mandate and Stay of Order of I.C.C.—*Exxon Pipeline*

9/ 8/77 Flg. Order Denying Exxon's Motion for Stay of Mandate and Denying Exxon's Motion for Stay of ICC's order. (JRB/PHR)—*Exxon Pipeline*

9/ 8/77 Flg. Order Denying BP's Petition for Rehearing and Denying Petition for Rehearing en banc. (JRB/PHR)—*BP Pipelines*

Date	
9/ 8/77	Judgment Issued as Mandate—*all cases*
9/26/77	Notice of Flg. of Cert. Pet. on 9-22-77—*Mobil Alaska and Exxon Pipeline*
10/17/77	Notice of Flg. of Cert. Pet. on 10-12-77—*BP Pipelines*
10/26/77	Flg. Copy of Supreme Ct. Order staying order of I.C.C. pending final disposition of petition for certiorari in Supreme Ct.—*Mobil Alaska*
11/ 1/77	Notice of Flg. of Cert. Pet. on 10-25-77—*ARCO Pipe Line*
12/ 2/77	Order of S.C. granted [certiorari] 11-28-77—*all cases*

INTERSTATE COMMERCE COMMISSION

Docket 36611

Title/Substance of Document

6/2/77 1. NOTICE: To Trans-Alaska Pipeline System owners. Requesting prompt filing of data concerning proposed rate levels and each company is asked to send a copy of its data submittal simultaneously to the State of Alaska.
[By] ROBERT L. OSWALD, Secretary (1 p.)

6/8/77 2. NOTICE: Requesting that any protests to the tariffs be filed by 6/13/77, and that replies to protests be submitted by 6/15/77.
[By] ROBERT L. OSWALD, Secretary (2 pp.)

6/13/77 3. SUPPLEMENTAL NOTICE: Advising the effective dates of tariffs filed by Sohio Pipe Line Company, BP Pipelines, Inc., and Mobil Alaska Pipeline Company have been postponed from 6/20/77 to 6/30/77, in view of these postponements, the filing dates set forth in the notice in item next above are modified, and that notice should be disregarded and requesting that protests to all of the tariffs now on file be submitted 6/15/77, and replies by 6/22/77. Parties desiring to participate in

Date

oral argument shall comply with rule 98 of the Commission's General Rules of Practice, by submitting a request for an allotment of time on or before 6/17/77.
[By] H. G. HOMME, JR., Acting Secretary (2 pp.)

6/14/77 4. PETITION: In aid of ICC Jurisdiction.
[By] STATE OF ALASKA
(by J. M. Cleary) (6 pp.)

6/15/77 5. REPLY: To the petition in item next above.
[By] SOHIO PIPE LINE COMPANY (4 pp.)

6/15/77 6. PROTEST/COMPLAINT
[By] STATE OF ALASKA
(by J. M. Cleary) (99 pp.)

6/15/77 7. PROTEST: And PETITION for Suspension and Investigation.
[By] BUREAU OF INVESTIGATIONS AND ENFORCEMENT, I.C.C.
(by E. D. Greenberg) (104 pp.)

6/15/77 8. PRELIMINARY STATEMENT
[By] TERRY F. LENZNER (representing Alaska Pipeline Commission) (267 pp.)

6/15/77 9. PETITION: AND COMPLAINT for suspension of initial rates and rules for transportation of petroleum via the Trans Alaska Pipeline System (TAPS) from Prudhoe Bay, Alaska, to Valdez, Alaska, and for an investigation thereof.
[By] ARCTIC SLOPE REGIONAL CORPORATION
(by W. W. Becker) (30 pp.)

6/15/77 10. PROTEST: And PETITION for suspension.
[By] UNITED STATES DEPARTMENT OF JUSTICE
(by P. J. Tomao) (29 pp.)

6/15/77 11. LETTER: Transmitting data, they believe, that the rate of earnings estimates will be produced by their initial tariff will not exceed any lawful criterion of the reasonableness of such earnings.
[By] SOHIO PIPE LINE COMPANY
(by J. T. Boltacz) (8 pp.)

Date

6/15/77 12. LETTER: Transmitting the basis for the computation of their tariff rate issued on 6/15/77.
[By] UNION ALASKA PIPELINE COMPANY
(by D. M. Schwartz) (4 pp.)

6/16/77 13. SUPPLEMENTAL PETITION: And COMPLAINT to the petition and complaint in item #13 above.
[By] ARCTIC SLOPE REGIONAL CORPORATION
(by W. W. Becker) (4 pp.)

6/17/77 14. ORDER: That the petition in item #4 above is *denied.*
[By] THE COMMISSION (Commissioners Murphy, Hardin, and Christian not participating) (1 p.)

6/17/77 15. ORDER: That an investigation is instituted; that the investigation in this proceeding shall include all matters and issues with respect to the lawfulness of the said schedules under the IC Act; and that the carriers parties to the schedules are made respondents to this proceeding.
[By] THE COMMISSION (Commissioners Murphy, Hardin, and Christian not participating) (2 pp.)

[Requests for oral argument time omitted]

6/17/77 21. Response to the notice in item #1 above.
[By] BP PIPELINES, INC.
(by D. A. Lucas) (23 pp.)

6/20/77 22. PROTEST: And PETITION for suspension and investigation.
[By] BUREAU OF INVESTIGATIONS AND ENFORCEMENT
(by E. D. Greenberg) (3 pp.)

6/21/77 23. LETTER: Transmitting a computation of the elements making up the determination of their proposed rate level.
[By] AMERADA HESS PIPELINE CORPORATION
(by A. S. Tabor, Jr.) (10 pp.)

6/22/77 24. NOTICE: Advising time allotments for Pipeline Companies and the protestants.
[By] H. G. HOMME, JR., Acting Secretary (2 pp.)

Date

6/22/77 25. REPLY: To the protests in item #'s 6, 7, 9, 10 and 13 above.
[By] MOBIL ALASKA PIPELINE COMPANY
(by A. J. Kilcarr) (67 pp.)

6/22/77 26. REPLY: To the protests in item #'s 6, 9 and 10 above.
[By] EXXON PIPELINE COMPANY
(by R. J. Flynn) (219 pp.)

6/22/77 27. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] UNION ALASKA PIPELINE COMPANY
(by D. M. Schwartz) (25 pp.)

6/22/77 28. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] PHILLIPS ALASKA PIPELINE CORPORATION
(by R. M. Shibley) (11 pp.)

6/22/77 29. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] SOHIO PIPE LINE COMPANY
(by C. J. Lansdale) (34 pp.)

6/22/77 30. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] AMERADA HESS PIPELINE CORPORATION
(by R. Moody, Jr.) (25 pp.)

6/23/77 31. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] BP PIPELINES, INC.
(by J. Vickrey) (21 pp.)

6/23/77 32. SECOND SUPPLEMENT: To petition and complaint in item #'s 9 and 13 above.
[By] ARCTIC SLOPE REGIONAL CORPORATION
(by W. W. Becker) (8 pp.)

6/23/77 33. STATEMENT
[By] ALASKA PIPELINE SYSTEM
(by B. E. Benjamin) (13 pp.)

6/23/77 36. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] ARCO PIPELINE COMPANY
(by R. E. Jordan, III) (198 pp.)

Date

6/27/77 37. LETTER: Addressed to Douglas Baldwin, requesting the Commission to reconsider its decision to close the special meeting scheduled for 6/28/77.
[By] UNITED PRESS INTERNATIONAL
(by G. Dillman) (2 pp.)

6/27/77 38. LETTER: Addressed to H. Gordon Homme, requesting. . . .
[By] DIANE B. COHN (on behalf of Edward K. DeLong, U.P.I.) (2 pp.)

6/27/77 39. LETTER: Addressed to A. Daniel O'Neal, requesting. . . .
[By] COMMON CAUSE
(by D. Cohen) (1 p.)

6/27/77 40. ORAL ARGUMENT: For testimony adduced at the oral argument held 6/27/77, see Volume 2 on page 9 herein.
[By] THE COMMISSION (208 pp.)

6/27/77 41. MOTION: For leave to file memorandum in reply to the responses of the carriers.
[By] THE DEPARTMENT OF JUSTICE
(by D. A. Kaplan) (9 pp.)

6/27/77 43. ORAL ARGUMENT EXHIBITS
[By] STATE OF ALASKA
(by J. M. Cleary) (10 pp.)

6/27/77 44. ORAL ARGUMENT EXHIBITS
[By] BUREAU OF INVESTIGATIONS AND ENFORCEMENT
(by E. D. Greenberg) (14 pp.)

6/27/77 TRANSCRIPT OF ORAL ARGUMENT: NO EXHIBITS IN EVIDENCE
(BY THE COMMISSION) (206 pp.)

7/1/77 45. THIRD SUPPLEMENTAL PETITION: And COMPLAINT.
[By] ARCTIC SLOPE REGIONAL CORPORATION
(by J. T. French) (4 pp.)

7/5/77 46. CONFERENCE: For testimony adduced at the conference held 7/5/77, see Volume 2 on page 9 herein.
(BY THE COMMISSION) (19 pp.)

Date

7/12/77 47. PROTEST/COMPLAINT: Seeking suspension and investigation.
[By] STATE OF ALASKA
(by J. M. Cleary) (10 pp.)

[End of Docket Entries in No. 36611 certified by the Secretary]

INTERSTATE COMMERCE COMMISSION

Docket I & S 9164

6/28/77 1. ORDER: That the operation of specified schedules is suspended, that the use thereof in interstate or foreign commerce be deferred from 6/30/77, and to and including 1/29/78, except as to I.C.C. 2, published by Amerada Hess, which bears a July 1 effective date and the operation of which is suspended to 1/31/78, unless ordered by this Commission; that an investigation is instituted into and concerning the lawfulness of the rates contained in the suspended schedules, as well as the interim schedules authorized to be filed, pursuant to section 15(1) and section 15(7), with a view to making such findings and orders in the premises as the facts and circumstances shall warrant; that the investigation in this proceeding shall include all matters and issues with respect to the lawfulness of the said rates under the IC Act; that the named carriers are authorized to file, upon not less than one day's notice, interim rates not exceeding specified amounts subject, however, to specified conditions; and that the said carriers are made respondents to this proceeding. (This order also embraces No. 36611).
BY THE COMMISSION (Commissioner Brown approves the order except insofar as it denied the motion of the Department of Justice for leave to file a response to the carrier's responses) (21 pp.)

7/8/77 3. PETITION: For Reconsideration.
[By] EXXON PIPELINE COMPANY
(by R. J. Flynn) (20 pp.)

Date		
7/15/77	8.	NOTICE: A court action was instituted on or about 7/6/77, involving these proceedings before the U.S. Court of Appeals for the Fifth Circuit. [By] H. G. HOMME, JR., Acting Secretary (1 p.)
7/15/77	9.	NOTICE: A court action . . . on or about 7/8/77. . . .
7/19/77	10.	NOTICE: A court action . . . on or about 7/11/77. . . .
7/26/77	11.	NOTICE: A court action . . . on or about 7/13/77. . . .
		[End of Docket Entries in No. I & S 9164 certified by Secretary]

VOLUME II

Verified Petition To Annul, Set Aside And Enjoin Enforcement Of An Order Of The Interstate Commerce Commission, July 6, 1977.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Case No. 77-2392

MOBIL ALASKA PIPELINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA;
THE INTERSTATE COMMERCE COMMISSION; and
A. DANIEL O'NEAL, Chairman
CHARLES L. CLAPP, Vice Chairman
RUPERT L. MURPHY, Commissioner
VIRGINIA MAE BROWN, Commissioner
GEORGE M. STAFFORD, Commissioner
DALE W. HARDIN, Commissioner
ROBERT C. GRESHAM, Commissioner
ALFRED T. MACFARLAND, Commissioner
BETTY JO CHRISTIAN, Commissioner

Respondents.

Mobil Alaska Pipeline Company ("Mobil Alaska") hereby petitions this Court to annul, set aside and enjoin enforcement of an order of the Interstate Commerce Commission ("Commission") which (1) suspends for seven months the effective date of the tariff rates filed by the owners of the Trans Alaska Pipeline System ("TAPS") including the rate filed by Mobil Alaska pending investigation and hearing by the Commission, and (2) which prescribes substantially lower rates to be applied by the TAPS

owners during the seven-month suspension period, on the grounds that the said order of the Commission (1) unlawfully exceeds its authority under the Interstate Commerce Act, 49 U.S.C. §§ 1 *et seq.;* (2) violates petitioner's constitutional right to due process of law; and (3) constitutes gross abuse of discretion. TAPS is a newly-constructed petroleum pipeline presently scheduled to commence common carrier operations on or about July 18, 1977, and the relief sought by petitioner would permit it to conduct operations at the originally-filed and presumptively lawful rates during the period of Commission investigation, rather than at the reduced rate prescribed by the Commission. Petitioner alleges as follows:

Parties

1. Petitioner Mobil Alaska Pipeline Company is a corporation organized and existing under the laws of the State of Delaware with its principal office at 1201 Elm Street, Dallas, Texas. Mobil Alaska's sole business activity consists of its ownership of a five (5) percent undivided interest in the Trans Alaska Pipeline System. It has no present or planned common carrier operations other than those described in this petition.

2. Respondent, the United States of America is a proper respondent in this action pursuant to 28 U.S.C. §§ 2322, 2344.

3. Respondent Interstate Commerce Commission is an agency of the United States organized and existing under the provisions of the Interstate Commerce Act, 49 U.S.C. §§ 1 *et seq.*, as amended ("Act").

4. Respondents David O'Neal, Chairman, Charles L. Clapp, Vice Chairman, Rupert L. Murphy, Virginia Mae

Brown, George M. Stafford, Dale W. Hardin, Robert C. Gresham, Alfred T. MacFarland and Betty Jo Christian are Commissioners of the Interstate Commerce Commission and in that capacity have been delegated certain powers and duties pursuant to the Act. These respondents are named herein in their official capacities and subsequent references to "Commission" are intended, unless the context otherwise indicates, to include both the Commission and its Commissioners.

Jurisdiction and Venue

5. This action arises under the Interstate Commerce Act, 49 U.S.C. § § 1 *et seq.* and the Fifth Amendment to the Constitution of the United States.

6. The jurisdiction of this Court is invoked pursuant to 5 U.S.C. § § 702, 705 and 28 U.S.C. § § 2321(a), 2342(5) and 2349. Under 28 U.S.C. § § 2321(a) and 2342(5) the courts of appeals of the United States are vested with exclusive jurisdiction of proceedings to enjoin, set aside, suspend or determine the validity of orders of the Interstate Commerce Commission. Relief is requested pursuant to 28 U.S.C. § 2349, as well as 28 U.S.C. § 1651(a) which authorize all courts established by Act of Congress to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

7. Venue in this action is properly laid in the Fifth Circuit Court of Appeals. Pursuant to 28 U.S.C. § 2343, petitions to enjoin or set aside orders of the Commission may be brought in the judicial circuit in which the petitioner maintains its principal office.

8. Petitioner has exhausted all administrative remedies available for the protection of its rights and has no prompt, adequate or effective remedy of law.

BACKGROUND

9. In 1968 the discovery of a very large deposit of oil in the Prudhoe Bay area on the North Slope of the State of Alaska generated immediate and substantial exploration interest in that area on the part of the major oil companies of the world. Bids were submitted to the State of Alaska at its invitation for exploration and development rights on the North Slope and the successful bidders were announced on September 10, 1969, this sale contributing more than $900 million to the State's treasury.

10. Shortly after the Prudhoe Bay discovery, plans were announced to construct a pipeline to transport the crude oil approximately 800 miles south to the Port of Valdez where it would be transshipped by tankers to domestic markets. In 1970, seven oil companies (another company joined the group later) agreed to jointly construct the pipeline through an agent corporation to be known as Alyeska Pipeline Service Company. Alyeska means "the great land" in the Aleut Language.

11. Research and planning for this complex project were underway by 1971 and application to the Department of Interior for right of way permits through federal lands was made. However, the commencement of actual construction was delayed from 1971 to 1974 by litigation over the environmental consequences of the project.

12. The delay caused by the judicial and administrative disputes over whether and how the pipeline should be constructed was ended by enactment on November 16, 1973, of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § § 1651 *et seq.*, which declared that "[t]he earliest possible construction of a trans-Alaska oil pipeline . . . will best

serve the national interest." That Act further declared, "The early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources." 43 U.S.C. § 1651 (Supp. 1977).

13. Construction of the pipeline system began officially in April, 1974 with work on the 360 mile-long haul road north of the Yukon River. The haul road, completed in only five months, made possible the first overland, all-weather route from the Yukon to Prudhoe.

14. In addition to the haul road, fifteen permanent access roads were built to link the main road with pump station sites and with the three permanent airfields and eight temporary airfields also built as part of the project. A two lane bridge over the Yukon River at a point where it is one-half mile wide was built as part of the pipeline route.

15. The project encountered numerous challenges. TAPS crosses some of the most rugged terrain in North America, varying from flood plains and river crossings to high mountain passes with hostile climactic conditions. Unusual design problems were caused by the permafrost, a permanently frozen marsh, through which the line was to be constructed. The heat caused by construction and actual transportation of crude oil risked permanent damage to this ecologically fragile environment without innovative design techniques. The possibility of earthquakes further complicated design and construction.

16. Response to these problems resulted in building 423 miles of pipeline above ground on cross beams supported by vertical support members ("VSM"). A VSM is an 18-inch pipe, specially designed and made for TAPS. The

mounted pipe is fully insulated with four inches of resin-impregnated fiberglass covered with a galvanized steel jacket while the assemblies are covered with molded fiberglass and polyurethane foam. This insulation is to keep the oil from chilling to below the pour point. To keep the permafrost from warming, seventy percent of the 80,000 VSM's have selfsupporting heat pipes enclosing systems which take heat from the ground and transfer it to the air. Some underground pipe is surrounded by insulation and cooling units to protect the permafrost.

17. Thirty-one construction camps along the pipeline route, each typically costing approximately 7-10 million dollars, were built.

18. The Valdez marine terminal, built at a cost in excess of $1 billion, is one of the most technologically advanced marine facilities in the world; it includes ballast treatment facilities, oil storage tanks and berths capable of handling supertankers of 195 thousand deadweight tons. The TAPS project as a whole is reputed to be the largest private construction project in recent history.

19. On June 20, 1977 the construction of the 800-mile TAPS pipeline was completed at a cost exceeding $9 billion dollars, including over $1.2 billion dollars in interest costs to date. A map illustrating TAPS' route from the Arctic Ocean to the Gulf of Alaska is attached as Exhibit A. At the same time, the pipeline owners began to fill the line with North Slope oil in preparation for the commencement of common carrier transportation operations when the oil arrives in the Port of Valdez. It is estimated that the line-fill will not be completed until on or about July 18, 1977, since meticulous monitoring of the entire pipeline is being employed to assure satisfactory performance.

NATURE OF THE CONTROVERSY

20. Mobil Alaska and seven other companies own undivided interests in TAPS. Under the undivided interest form of ownership, each owner holds its percentage share of the system as its exclusive separate property, is required to contribute its corresponding share of the total costs of the system, and has the right and obligation to utilize its percentage share of the capacity of the system as a common carrier to transport oil for any shipper without discrimination. Each owner must separately publish tariffs and receive tenders for shipments through its portion of the capacity of TAPS. TAPS owners and their percentage ownership interests are:

Sohio Pipe Line Co.	33.34%
Arco Pipe Line Co.	21%
Exxon Pipeline Co.	20%
BP Pipelines Inc.	15.84%
Mobil Alaska Pipeline Co.	5%
Phillips Alaska Pipeline Corp.	1.66%
Union Alaska Pipeline Co.	1.66%
Amerada Hess Pipeline Corp.	1.50%

21. Upon filling of the pipeline in mid July, 1977, crude oil will be available for delivery at the TAPS Marine Terminal at Valdez. At that time Mobil Alaska would be able to operate as a common carrier subject to the provisions of the Interstate Commerce Act, 49 U.S.C. §§ 1 *et seq.*, if it has on file at the Commission a tariff which has not been cancelled or suspended.

22. Pursuant to 49 U.S.C. § 6(1) every common carrier subject to the Act must file with the Commission and publish a tariff "showing all the rates, fares, and charges for transportation between different points on its own route.

. . ." Deviation from tariffs so filed is prohibited by 49 U.S.C. § 6(7); transportation operations without a lawfully filed tariff are prohibited by the same paragraph of § 6. The Commission is without authority under § 6 to reject a tariff filed under § 6 unless its form is not in compliance with Commission regulations, 49 U.S.C. § 6(6), or it fails to state its effective date, 49 U.S.C. § 6(9).

23. The regulations of the Commission, Tariff Circular 20, Rule 57, 49 C.F.R. § 1300.57, require that tariffs applicable to newly constructed pipelines be filed with the Commission not less than ten days before the effective date of said tariffs. Tariff changes are required by 49 U.S.C. § 6(3) to be filed on thirty-days' notice unless special permission to file on less notice is obtained.

24. Pursuant to the requirements of Tariff Circular 20, Mobil Alaska filed its first and only tariff over the Trans Alaska Pipeline System on June 10, 1977 effective June 20, 1977. Mobil Alaska's Tariff I.C.C. No. 1 included the rules which would govern its acceptance and shipment of crude oil. This tariff covering the rules is not in controversy. Mobil Alaska's Tariff I.C.C. No. 2 included only its rate, the amount in cents per barrel of crude oil which it will charge for transportation from Prudhoe Bay to Valdez. In order to accommodate a Commission request, Mobil Alaska filed a supplement extending the effective date of its rate tariff to June 30, 1977, and it is this rate tariff which is the subject of this controversy.

25. Mobil Alaska's rate tariff was lawfully filed in accordance with the requirements of 49 U.S.C. § 6 and it is presumptively lawful and reasonable under the Act unless and until adjudicated unlawful on the basis of record evidence developed at a "full hearing" pursuant to 49 U.S.C. § 15(1).

26. On June 13, 1977, the Commission issued a Notice announcing that it would conduct a summary suspension proceeding to consider TAPS rate tariffs. The Notice contained a schedule which provided for submission of protests to the six TAPS rate tariffs then on file at the Commission, and also provided for the submission of replies to any protests by the TAPS owners. The Notice further announced that oral argument would be held on June 27, 1977 and stated that the deadline for a Commission decision on any relief requested by protestants would be June 29, 1977.

27. On June 15, 1977, the United States Department of Justice, Antitrust Division, the Bureau of Investigations and Enforcement of the Interstate Commerce Commission, the State of Alaska and the Arctic Slope Regional Corporation ("Protestants") filed protests to the TAPS tariffs then on file at the Commission. Alleging all the TAPS rates to be unlawful, each of the four Protestants requested that the Commission suspend the TAPS owners' tariffs, including that of Mobil Alaska, and that it institute a formal investigation of all the TAPS rates. In addition, each of the Protestants urged the Commission to establish interim rates, substantially lower than the carrier-filed rates, which the TAPS owners would be allowed to refile on one day's notice. Such interim rates were requested to supplant the carrier-initiated rates and to remain in effect pending the expected formal hearing adjudicating the lawfulness of the TAPS rates. Protestants stated that they urged the prescription of interim rates in order to avoid the effect of a suspension decision—preclusion of lawful transportation operations—during the pendency of the suspension period.

28. On June 22, 1977, Mobil Alaska submitted its reply to the protests in which it argued that its challenged rate was both reasonable as well as lawful; that the Commission lacked authority to suspend a first rate filed for a newly-constructed pipeline which was planned and constructed to offer transportation services not previously available at that location; and that a suspension order entered without prejudice to refiling at a lower rate suggested or prescribed by the Commission would be unlawful.

29. On June 27, 1977, the full Commission heard oral argument on the protests, including Mobil Alaska's contentions that the Commission lacked the power to suspend the TAPS rate tariffs and that any Commission order designed to result in refiling of TAPS rates at lower levels would constitute unlawful prescription of rates.

The Commission's Order

30. The full Commission, on June 28, 1977, entered an order suspending the rate tariffs as filed by Mobil Alaska and six other TAPS owners; the eighth owner's tariff having been filed later than the rest, it was found by the Commission as not ripe for disposition. The order suspended the rates for the maximum period of seven months as specified in 49 U.S.C. § 15(7); instituted an investigation into and concerning the lawfulness of the rates in the suspended schedules; and authorized the TAPS owners to refile, on not less than one-day's notice, "interim rates" not exceeding rates specified in the order. A copy of this order is attached as Exhibit B.

31. The interim rates set by the Commission are substantially lower than those filed by the TAPS owners:

	As Filed By TAPS Owners	Authorized By Order	Reduction
Amerada Hess Pipeline Corporation	$6.44	$4.85	$1.59
Arco Pipe Line Company	6.04	4.91	1.13
BP Pipelines Inc.	6.35	4.68	1.67
Exxon Pipeline Company	6.27	5.10	1.17
Mobil Alaska Pipeline Company	6.31	4.84	1.47
Phillips Alaska Pipeline Corporation	6.22	Not Acted Upon Yet	
Sohio Pipe Line Company	6.16	4.70	1.46
Union Alaska Pipeline Company	6.09	4.89	1.20

32. The TAPS owners argued that the Commission was not empowered to suspend originally filed rates, and even if so authorized, no basis existed for suspension of the TAPS rates:

> [TAPS owners] argue that protestants would not be harmed by allowing the proposed rates to go into effect, inasmuch as refunds or reparations would be available if the investigation should show that the filed rates are too high. Order at 3.

33. The Protestants argued that the possibility of refunds did not constitute adequate protection:

> The Arctic Slope Regional Corporation, which represents Alaskan Natives, notes that the longer it must wait for its share of royalty revenues (which

> are adversely affected by high transportation rates), the less value such revenues will have. Protestants also argue that the maintenance of pipeline rates at too high a level would act as a deterrent to the use of the pipeline by independent oil producers. Order at 3.

34. The Commission held:

> Although we recognize that the refund remedy is available, we do not believe that the rates can be allowed to go into effect, without suspension, when, as here, the protestants have made a showing or probable unlawfulness. Moreover, as noted by protestants, the maintenance of excessively high rates could act as an obstacle to the use of the pipeline by non-affiliated oil producers, and would also delay the Alaskan interests in obtaining revenues that depend upon the wellhead price of the oil. Under the circumstances, we have concluded that the proposed rates, as filed, should be suspended, pending our investigation, for the statutory period of 7 months. Order at 3.

35. The Commission further concluded that the power to allow interim rates is inherent in the suspension power and that to suspend without "allowing" interim rates "would be to preclude the carriers from commencing their operations during the suspension period." Order at 4. The Commission also recognized that the TAPS owners "may" have no means of obtaining restitution in the event that they acceded to the Commission's order and the investigation proved the interim rates imposed during the suspension period to be too low. Order at 4.

36. The interim rate set for the Mobil Alaska portion of TAPS was alleged to have been computed by the Commission using "basic data supplied" by petitioner and other TAPS owners. Mobil Alaska has not, however, supplied to the Commission the data upon which it computed its originally filed rate. Therefore the Commission's calculations necessarily were based in part upon assumptions concerning both the data applicable to Mobil Alaska's rate, as well as assumptions by the Commission concerning the procedures followed by petitioner when it computed its rate as originally filed.

Relevant Statutory Provisions and Regulations

37. Those to be regulated by the Commission are covered in Section 1 of the Act which states in relevant part

> (1) That the provisions of this part shall apply to *common carriers engaged in* . . .
>
> (b) The *transportation* of oil . . . by pipe line, or partly by pipeline and partly by railroad or by water. 49 U.S.C. § 1 (emphasis added)

38. The Commission's power to suspend tariffs is governed by § 15(7), incorporated into the Act with the passage of the Mann-Elkins Act in 1910, Pub. L. No. 61-218, ch. 309, 36 Stat. 539, June 18, 1910, which states in relevant part:

> Whenever there shall be filed with the Commission *any schedule stating a new individual or joint rate,* fare, or charge, or any *new* individual or joint classification, or any *new* individual or joint regulation or practice *affecting any rate, fare, or charge,* the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without

> complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. . . . 49 U.S.C. § 15(7) (emphasis added).

39. A proceeding pursuant to § 15(7) to determine whether to suspend a proposed "new" tariff rate is a summary, informal proceeding designed to permit a discretionary decision not ordinarily subject to judicial review. It is made within the short period of time after a rate is filed but before its effective date. No evidentiary rights exist in a suspension proceeding nor is any record developed as a basis for judicial review, Commission Rules of Practice ("Commission Rules"), Rule 200, 49 C.F.R. § 1100.200. Commission Rule 57, 49 C.F.R. § 1100.57, specifically precludes use of normal discovery devices in hearings governed by Rule 200.

40. To ensure the complete separation of the summary suspension proceeding from a due process hearing pursuant

to § 15(1), Commission Rule 19, 49 C.F.R. § 1100.19 declares that documents filed in a suspension proceeding shall not constitute evidence

> Recitals of material and relevant facts in a pleading filed prior to oral hearing in any proceeding, unless specifically denied in a counterpleading filed under these rules, shall constitute evidence and be a part of the record without special admission or incorporation therein, but if request is seasonably made, a competent witness must be made available for cross-examination on the evidence so included in the record. Pleadings may contain specific references to or quotation from the tariffs or schedules containing the several rates, fares, charges, schedules, classifications, regulations or practices alleged to be material. A filing under Rule 42 *Petitions for suspension of tariffs or schedules,* shall not be considered a pleading for purposes of this rule. 49 C.F.R. § 1100.19.

41. The Commission's power to determine and prescribe rates is governed by Section 15(1) of the Act which states in relevant part:

> That whenever, *after full hearing,* upon a complaint made as provided in Section 13 of this title, or *after full hearing* under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property . . . is or will be unjust or unreasonable . . . or otherwise in violation of any of the provisions of this chapter, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate . . . 49 U.S.C. § 15(1). (emphasis added)

FIRST CAUSE OF ACTION

42. Mobil Alaska repeats and realleges paragraphs 1 through 41 above with full force and effect as if fully set forth herein.

43. The Commission's actions and order suspending petitioner's TAPS tariff rate were in excess of its lawful authority and without observance of the procedures required by law. Petitioner will suffer irreparable harm by reason of its tariff rate not being in effect when the TAPS pipeline is ready to commence common carrier operations on or about July 18, 1977.

44. Petitioner's originally-filed tariff rate for the TAPS pipeline is not a "new" rate within the meaning of Section 15(7) of the Act and thus cannot be suspended by the Commission.

> a. The Trans Alaska Pipeline System is newly-constructed to afford crude oil transportation in a geographic location previously devoid of any regulated common carrier operations performing the same or similar services.
>
> b. The Trans Alaska Pipeline System is clearly *sui generis* in the history of pipeline construction projects attempted in the United States due to the unique climatic conditions, terrain circumstances

and environmental concerns which the builders were required to overcome.

c. The Trans Alaska Pipeline System was built in three years with minimum effect on the surrounding environment, a remarkable construction and engineering feat considering the uniquely adverse conditions which had to be surmounted.

d. The Congress of the United States declared that the *"earliest possible construction* of a trans-Alaska pipeline from the North Slope of Alaska to Port Valdez in that State will make the extensive proven and potential reserves of low-sulfur oil available for domestic use and *will best serve the national interest,"* 43 U.S.C. § 1651(c) (emphasis added), thus further distinguishing the construction of TAPS from any other pipeline construction project.

e. The operation of the Trans Alaska Pipeline System will present continuing financial risks to its owners quite unlike any associated with other petroleum pipeline operations in the United States since environmental concerns required that 423 miles of TAPS be constructed above ground making it vulnerable to sabotage, earthquake, and climatic damage which could result in damage to the surrounding environment in the event of a break in the line.

f. The tariff rates originally filed by the TAPS owners, while computed in accordance with standard rate-determination procedures as established and endorsed by past Commission practice, nevertheless present unprecedented rate-determination questions for eventual disposition by the Commission.

g. The originally-filed TAPS tariff rates are not "new" rates within the meaning of Section 15(7), and thus not subject to the Commission's summary suspension power for the further reason that they do not

i. change, replace or otherwise affect an existing rate;

ii. pertain to a pipeline or other transportation facility presently engaged in transportation within the meaning of the Act; and

iii. pertain to a transportation service which, upon summary suspension of the "new" rate, would continue to be available to the public.

h. Mobil Alaska's originally-filed TAPS tariff rate, not constituting a "new" rate within the meaning of the Act, the Commission is prevented by the Act from making any determination concerning the reasonableness, justification, and lawfulness of said tariff unless and until a full evidentiary hearing is held, and petitioner afforded meaningful opportunity to discover and test the evidence, if any, upon which the reasonableness of its rate is challenged, so that the Commission's determination would be susceptible to judicial review.

i. Mobil Alaska is not a common carrier subject to regulation by the Commission since it is not "engaged" in transportation within the meaning of the Act, 49 U.S.C. § 1, and will not be in a position to engage in transportation until such time as TAPS is filled and ready to deliver crude oil at the Port Valdez in Alaska. Suspension of petitioner's tariff presents petitioner with two choices, either (1) delay

commencement of common carrier operations pending investigation, full hearing and ultimate determination of the TAPS rate questions by the Commission, or upon expiration of seven months, whichever should occur first; or (2) accept the Commission's interim rate pending final rate determination or the expiration of the seven-month period. The Commission's power to suspend "new" rates does not include the power to impose further sanctions of this nature upon pipeline owners and further evidences that petitioner's originally-filed TAPS tariff is not a "new" tariff within the meaning of the Act.

SECOND CAUSE OF ACTION

45. Mobil Alaska repeats and realleges paragraphs 1 through 41 above with full force and effect as if fully set forth herein.

46. Even if Mobil Alaska's originally-filed TAPS tariff is a "new" tariff within the meaning of Section 15(7) of the Act, in summarily determining "that there has been a sufficient showing of probable unlawfulness," and in ordering the suspension of petitioner's tariff rate, the Commission acted arbitrarily and capriciously and grossly abused its discretion.

a. Mobil Alaska has not been permitted appropriate opportunity to present any evidence concerning the procedures followed and the standards complied with in the formulation of its originally-filed rate. The Commission's rules do not require submission of such evidence when a rate is filed, 49 U.S.C. § 6, the requirement arising only upon insti-

tution of an investigation by the Commission in accordance with Section 15(1) of the Act. The investigation of petitioner's tariff commenced with the Commission's order which was issued on June 28, 1977 and which also ordered the suspension of said tariff rate.

b. The Commission's Rules do not permit filings made seeking suspension of rates to be considered as evidence. Rule 19.

c. Since the Trans Alaska Pipeline System is a newly-constructed property located in a part of the United States where oil has only recently been discovered, and since the magnitude and complexity of the TAPS construction project is unrivaled in the history of the petroleum pipeline industry, the Commission lacked the experience as well as the expertise upon which it might call for purposes of preliminarily assessing the "probable unlawfulness" of petitioner's originally-filed rate.

d. The Commission's actions and order suspending petitioner's TAPS rate were in fact based upon the opinions of representatives of the protestants, State of Alaska and Arctic Slope Regional Corporation. Petitioner was deprived of any reasonable opportunity to test the validity of those opinions, in particular, their claims that maintenance of the rates as originally filed by the TAPS owners pending final determination as to reasonableness by the Commission following investigation and hearing (1) "could act as an obstacle to the use of the pipeline by non-affiliated oil producers"; (2) that the longer the Arctic Slope Regional Corporation, which represents the

Alaskan Natives, "must wait for its share of royalty revenues (which are adversely affected by high transportation rates), the less value such revenues will have"; and (3) that the possibility of refunds does not constitute "adequate protection" for the protestants. Order at 3.

e. Sub-paragraphs a. through i. of paragraph 44 above are repeated and realleged with full force and effect as if fully set forth herein.

THIRD CAUSE OF ACTION

47. Mobil Alaska repeats and realleges paragraphs 1 through 43 above with full force and effect as if fully set forth herein.

48. The Commission's actions and order prescribing the rate at which petitioner would be permitted to operate its portion of TAPS as a common carrier until January 29, 1978 were in excess of its lawful authority and without observance of the procedures required by law. Petitioner will suffer irreparable harm by reason of its originally-filed tariff rate not being in effect for the specified seven-month period.

49. Section 15(1) of the Act provides the procedures to be followed before the Commission is empowered to determine and prescribe a rate and to issue an order prohibiting a carrier from publishing, demanding or collecting any rate other than the rate prescribed, 49 U.S.C. § 15(1). Section 15(1) provides that the Commission may only prescribe a rate "after full hearing."

50. Neither Section 15(1) nor Section 15(7) of the Act grants to the Commission any authority to prescribe a rate

on the basis of summary proceedings that deprive the carrier of the right to discovery, as provided in the Rules, as well as the right to a full hearing on the record with the opportunity to present evidence to support the reasonableness of its rate and to test by cross-examination and otherwise, allegations that its rate is unreasonable.

FOURTH CAUSE OF ACTION

51. Mobil Alaska repeats and realleges paragraphs 1 through 41 above with full force and effect as if fully set forth herein.

52. Even if the Commission is empowered to prescribe interim rates on the basis of summary proceedings and is not required to take such action after full hearing, the exercise of such power on June 28, 1977 as to Mobil Alaska was arbitrary and capricious and constituted gross abuse of Commission discretion for the reasons set forth in subparagraphs (a) through (i) of paragraph 44 above and subparagraphs (a) through (d) of paragraph 46 above.

FIFTH CAUSE OF ACTION

53. Mobil Alaska repeats and realleges paragraphs 1 through 41 above with full force and effect as if fully set forth herein.

54. The Commission's actions and order suspending petitioner's originally-filed TAPS tariff rate and the setting of an interim rate as a condition precedent for the commencement of common carrier operations by petitioner as an owner of the Trans Alaska Pipeline System, are prohibited by the Fifth Amendment to the Constitution of the United States and violate elementary and controlling principles of fairness and administrative due process for the

reasons set forth in subparagraphs (a) through (i) of paragraph 44 above and subparagraphs (a) through (d) of paragraph 46 above.

SIXTH CAUSE OF ACTION

55. Mobil Alaska repeats and realleges paragraphs 1 through 41 above with full force and effect as if fully set forth herein.

56. The interim rate of $4.84 per barrel which the Commission seeks to impose upon petitioner's operation of its portion of the Trans Alaska Pipeline System for the period on or about July 18, 1977 through January 29, 1978 would not permit Mobil Alaska to cover its share of operating expenses for TAPS during that period, nor its capital costs of doing business. The interim rate of $4.84 per barrel would not produce enough revenue during the period to allow Mobil Alaska to service its debt and allow a return on equity sufficient to attract capital (Order at 7).

57. Mobil Alaska will have no opportunity to recoup the losses in revenue and other losses which it will incur if the interim rate becomes effective during the suspension period. Thus, the Commission's actions and order suspending petitioner's originally-filed tariff rate, and the setting of an interim lower rate as a condition precedent to petitioner's operation of its portion of TAPS for the period July 18, 1977, or thereabouts, through January 29, 1978 constitutes confiscation of Mobil Alaska's property without just compensation in violation of rights guaranteed by the Fifth Amendment to the Constitution of the United States.

IRREPARABLE INJURY

58. Unless enjoined and restrained by this Court, respondents' actions and orders as herein before alleged will cause immediate, substantial and irreparable injury to petitioner and others, including the following:

a. The Commission's actions and order of June 28, 1977 will require Mobil Alaska to choose between the following alternatives on or before July 17, 1977, each of which will cause irreparable injury to petitioner:

(i) Petitioner can elect not to refile its TAPS tariff at the $4.84 rate prescribed by the Commission, which would deprive it of common carrier status under the Act and thus effectively prevent operation of its portion of TAPS until such time as the Commission completes its determination as to the lawfulness of petitioner's originally-filed rate or until January 29, 1978, whichever should occur first. This course of action would postpone for at least some months the time when Mobil Alaska could expect its investment in TAPS to commence producing revenue, and would thus constitute a revenue loss of up to $88,000 per day to Mobil Alaska for each day after July 18, 1977, which is the date presently scheduled for the commencement of TAPS common carrier operations.

(ii) Petitioner can otherwise elect to commence common carrier operations on or about July 18, 1977 by refiling its tariff at $4.84 in accordance with the Commission's order, which would result in a daily loss of revenue to Mobil Alaska, due to the $1.47 reduction in its original rate, of between

$44,100 to $88,200 per day until January 30, 1978 or ultimate Commission determination of the TAPS rates, whichever should occur first.

b. If petitioner is forced to accede to the Commission's actions and order, and operates its portion of TAPS at the reduced interim rate set by the Commission for the suspension period, it will suffer a loss amounting to approximately $18,522,000. The estimated loss which would be suffered by all TAPS owners resulting from the pipeline operation for the suspension period at the reduced rates would be approximately $343,335,000. These losses in revenue could not be recovered by the TAPS owners in the event that the Commission ultimately determines that their originally filed rates for TAPS are just, reasonable and lawful.

In contrast, royalty-owner protestants, as recognized by the Commission, Order at 3, stand to suffer delay in receipt of, but not loss of, royalty revenue should the originally filed rates remain in effect and the Commission ultimately determine a lower rate to be reasonable. Thus, if the interim rates were found to be the lawful rate, and the originally filed rates were effective during the suspension period, Alaska's royalty interest in Mobil Alaska's overcollection would be approximately $2,315,000, and $46,000 of that amount would represent the interest of Arctic Slope Regional Corporation. Thus, the Commission's actions and order, if implemented, will require Mobil Alaska permanently to forego $18.5 million in revenues for the principal purpose, according to the order, of merely assuring against any possibility of delay in royalty payments amounting to $2.3 million

for the State of Alaska and $46,000 for the Arctic Slope Regional Corporation.

c. If Mobil Alaska and/or other TAPS owners decide that it is in their best individual interest not to refile tariff rates at the interim levels set by the Commission, an alternative which is probably not economically viable given the magnitude of the investment made in TAPS and the owners' need to have that property start producing revenue, the resulting shut-in of all or part of the TAPS crude oil transportation capacity would cause irreparable injury to the national energy policy and the overall economy of the United States.

d. The respondents' actions will have a chilling effect upon future decisions to invest in petroleum pipeline property subject to Commission regulation due to the *ad hoc* and summary approach taken by the Commission in responding to the unsupported claims made against the TAPS rates by protestants.

59. The price to be paid by refiners on the West Coast of the United States for the North Slope crude oil to be transported by TAPS, and thus the price to be paid by consumers for the petroleum products to be manufactured from said crude, will not be affected by the subject controversy concerning the TAPS rates since the Federal Energy Administration (FEA) established the prices refiners will pay for North Slope crude and the TAPS transportation cost will be included within, and not in addition to, the FEA determined prices.

PRAYER

WHEREFORE, petitioner prays that this Court:

A. Enter judgment annulling and setting aside the Commission's order of June 28, 1977 in Investigation and

Verified Petition of Mobil Alaska To Annual ICC Order.

Suspension Docket No. 9164, "Trans Alaska Pipeline System (Rate Filings)";

B. Enter judgment enjoining and restraining the respondents and all persons acting under their direction and authority, or in active concert or participation with them from taking or attempting to take any action to prevent the tariff rates as originally filed by the TAPS owners, including the $6.31 rate as filed by petitioner, from becoming immediately effective and from remaining effective as the lawful rates applicable to the common carrier operation of that petroluem pipeline unless and until the Commission should determine and prescribe, following investigation and after full hearing, that rates other than those as originally filed are reasonable, just and lawful.

C. Enter judgment as prayed for in paragraph B above, preliminarily until ten (10) days after final determination of this action on the merits by this Court.

D. Grant petitioner such other, further or different relief as to the Court may seem just and proper.

Dated: July 5, 1977

Respectfully submitted,

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Council For Petitioner
Mobil Alaska Pipeline Company

[Verification of James R. Kinzer, Certificate of Service and Map of Trans Alaska Pipeline Route (Exhibit A) omitted in printing.]

Order of Interstate Commerce Commission Suspending Tariffs and Authorizing Interim Rates, Attached As "Exhibit B" to Verified Petition of Mobil Alaska Pipeline Co., Filed July 6, 1977.

ORDER *

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 28th day of June, 1977.

INVESTIGATION AND SUSPENSION
DOCKET NO. 9164

TRANS ALASKA PIPELINE SYSTEM
(Rate Filings)

No. 36611

TRANS ALASKA PIPELINE SYSTEM
(Rules and Regulations)

Initial rate tariffs have been filed by eight pipeline companies, proposing to operate as common carriers of crude petroleum over the Trans Alaska Pipeline System.

Protests and petitions for suspension of the tariffs have been filed by the United States Department of Justice, the State of Alaska, the Arctic Slope Regional Corporation and our Bureau of Investigations and Enforcement. These pleadings seek to invoke our power under section 15(7) of the Interstate Commerce Act (1) to enter upon a hearing concerning the lawfulness of the tariffs and (2) pending the hearing and decision, to suspend the operation of the tariffs for a period no longer than seven months. Replies to the protests have been filed by each of the eight carriers.

The tariffs are identified in Appendix 1 to this order. As noted therein, the various rules contained in the tariffs have already been placed under investigation by Commission order dated June 17, 1977, No. 36611. Consideration of the tariff rates, however, was deferred

* Corrected to include changes set forth in Correction Notice dated June 29, 1977.

to the present order. The rates per barrel proposed by the respective companies are as follows:

Amerada Hess Pipeline Corporation	$6.44
Arco Pipe Line Company	6.04
BP Pipelines Inc.	6.35
Exxon Pipeline Company	6.27
Mobil Alaska Pipeline Company	6.31
Phillips Alaska Pipeline Corporation	6.22
Sohio Pipe Line Company	6.16
Union Alaska Pipeline Company	6.09

With respect to these rates, we have given careful consideration to the protests, and to the carriers' replies. In addition, we have heard oral argument by the parties. It is our conclusion that a formal investigation concerning the lawfulness of the proposed rates should be instituted pursuant to sections 15(1) and 15(7) and that because of the close interrelationship of the rate filings and the applicable rules and regulations, they should be considered in the same proceeding. We further conclude that such rates should be suspended, without prejudice to the filing of interim rates, during the suspension period.

In reaching these conclusions, we have considered the following issues: (1) whether an investigation should be instituted; (2) whether the proposed rates can and should be suspended; (3) whether interim rates can and should be authorized; (4) what level of interim rates should be authorized: and (5) what conditions should be attached to the acceptance of interim rate filings.

The institution of an investigation.

Section 15(7) of the act empowers the Commission to enter upon a hearing concerning the lawfulness of a filed tariff stating a new rate or charge. In order for a rate to be lawful, a primary requirement is that it be

just and reasonable (section 1(5)). The act sets forth other requirements as well, and if an investigation is instituted, any and all aspects of the lawfulness of the rate may be considered. However, the question raised by the protests is whether there is reason to believe the proposed rates are not just and reasonable.

Protestants contend that the filed rates would provide excessive profits, whether compared with a traditional rate of return on valuation or with the carriers' capital costs. They also contend that the cost data provided by the carriers is overstated.

The carriers reply that their rates were computed to allow a 7 percent return on valuation, as contemplated in a 1941 consent agreement between the Justice Department and a number of shipper-owned pipelines (*United States* v. *Atlantic Refining Co.*, C.A. No. 14060, D.D.C. decided December 23, 1941). They also assert that the standards used by protestants are unrealistic in that they do not recognize that the carriers are able to maintain high levels of debt financing only because such debt is guaranteed by the parent oil companies. The carriers argue that, without such guarantees, they would have to resort to a larger amount of equity financing, and their overall capital costs would be higher than the amounts recognized by protestants. The carriers also deny that their cost data is overstated. However, they do not object to a formal investigation of the filed rates.

For reasons set forth below, we do not accept the 1941 consent decree as a standard of reasonableness under the Interstate Commerce Act. Moreover, while there may be merit to the carriers' contentions that the standards used by protestants do not cover their true costs of capital, this is a matter that cannot be resolved until a more complete record is developed. Finally, evidentiary hearings will be necessary to develop acceptable cost

data for use in applying whatever measures of reasonableness are found to be appropriate. Therefore, we conclude that there has been a sufficient showing of probable unlawfulness to warrant the institution of a formal investigation concerning the proposed rates.

The suspension of the proposed rates. Some of the carriers argue that the Commission is without power to suspend initial rates. They rely on numerous references in legislative history and past cases to exercise of the suspension power in instances of "increased" rates. They rely on such references to conclude that the power of suspension does not apply to initial rates. However, the reason that the suspension powers are usually discussed in the context of increased rates is clear: the vast majority of rate proceedings involve situations where increases in existing rates are at issue.

We see no basis in the sources cited for concluding that we may not suspend initial rates. If this were the Congressional intention, we believe that it would have been explicitly stated. It was not so stated, and the carriers have been unable to cite any direct authority for their position.

It is stated in section 15(7) that the Commission is authorized to enter upon a hearing concerning "any schedule stating a new individual or joint rate, fare, or charge." Pending this hearing and decision, the Commission may suspend, for up to seven months, the schedule being investigated. In *Rail-Water, Grain in Bulk, Mo., Ill., and Ind., to Buffalo*, 321 I.C.C. 564, 566 (1963), it was said that the term "new rate" in section 15(7) encompasses "both changed and initial" rates.

Similar suspension powers pertaining to other modes of carriage are contained in sections 216(g), 218(c), 307(g), and 406(e) of the act. In each of these sections, there is "grandfather" language making the provisions

inapplicable to "initial" rates filed on or before a certain date. By implication, then, the investigation and suspension provisions *are* applicable to initial rates filed after such date.

As noted, if it were intended to exclude initial rates from the suspension power of section 15(7), one would expect specific language to this effect. No such language appears. Accordingly, we have no doubt that the suspension power is applicable to initial rates.

The carriers also question whether, even if the suspension power is applicable, we should exercise it here. They argue that protestants would not be harmed by allowing the proposed rates to go into effect, inasmuch as refunds or reparations would be available if the investigation should show that the filed rates are too high.

Protestants, however, do not consider the possibility of refunds to be adequate protection. The Arctic Slope Regional Corporation, which represents Alaskan Natives, notes that the longer it must wait for its share of royalty revenue (which are adversely affected by high transportation rates), the less value such revenue will have. Protestants also argue that the maintenance of pipeline rates at too high a level would act as a deterrent to the use of the pipeline by independent oil producers.

Although we recognize that the refund remedy is available, we do not believe that the rates can be allowed to go into effect without suspension, when, as here, the protestants have made a showing of probable unlawfulness. Moreover, as noted by protestants, the maintenance of excessively high rates could act as a deterrent or an obstacle to the use of the pipeline by non-affiliated oil producers, and would also delay the Alaskan interests in obtaining revenues that depend upon the wellhead price of the oil. Under the circumstances, we have concluded that the proposed rates, as filed, should be suspended,

pending our investigation, for the statutory period of 7 months.

The specification of interim rates. Protestants seek to have the Commission name specific rates that may be charged by each carrier while the investigation is being conducted. The carriers, however, contend that the Commission has no power to do so. They argue that the specification of interim rates would be a rate prescription within the meaning of section 15(1) of the act, and that we are empowered to take such action only after a full hearing.

We see no basis for considering such action to be a prescription of rates.[1] We may authorize interim rates without requiring that the rates proposed in the tariffs be cancelled, and without precluding the proposed rates from taking effect at the end of the 7-month suspension period if our investigation is not then completed (subject, however to a refund provision as hereafter described). These interim rates would not be intended to have permanent effect, but would merely be interim rates that we would allow to be collected during the suspension period. Such rates, if filed, remain subject to Commission scrutiny and are not to be considered as prescribed

[1] *Moss* v. *C. A. B.*, 430 F.2d 891, is clearly distinguishable. That case involved ex parte meetings and the substitution by the Board of "a complete and innovative scheme for setting all passenger rates for the Continental United States," with an indication that such a filing would not be suspended. In *Moss*, the court noted that unlike the Interstate Commerce Act, the Federal Aviation Act has no provision for reparations, thus rendering the procedural safeguards of the Aviation Act the public's sole defense. The court also pointed out its view might have been different if interim action were involved. In the present TAPS proceeding, both the proposed rates and any interim rates which may be filed *will* remain subject to full investigation. See also *Consolidated Edison Co. of New York* v. *F. P. C.*, 168 U.S.App.D.C. 92, 512 F.2d 1332, 1340, distinguishing *Moss* v. *C. A. B.* and stressing the behind-the-scenes aspect of the *Moss* case.

within the meaning of the decision in *Arizona Grocery* v. *Atchison, T. & S. F. Ry., Co.*, 284 U.S. 370, 52 S.Ct. 183, 76 L.Ed. 348.

We believe that the power to allow interim rates is inherent in the suspension power. Without it, the Commission could be faced with the choice of allowing the carriers to operate at any rate they choose, whether or not lawful, or precluding carrier operations altogether. We do not believe that Congress could have intended our powers to be so inflexible. If the suspension power did not include the discretion to permit interim rates, it would be a substantially less satisfactory tool for serving the public interest.

Having concluded that we possess the power to authorize interim rates, we have no hesitation about taking such action in the present circumstances. If we were to suspend the proposed rates without allowing interim rates, the result would be to preclude the carriers from commencing their operations during the suspension period. Such a result would be contrary to the interests of all concerned.

The level of interim rates. We believe that the proper question to be asked concerning our action in these proceedings is not whether we have the discretion to authorize an interim rate. Rather, the question should be whether we have exercised such discretion in a reasonable manner.

The key to a proper exercise of our discretion in this situation lies in recognizing the possible consequences of our action. We must bear in mind that the carriers may have no means of obtaining restitution if initially required to maintain too low a rate. On the other hand, a remedy by way of refunds or reparations is available to persons injured by the charging of a rate that is ultimately found to be too high. In these circumstances,

the reasonable approach to determining an interim rate is (1) to accept the basic data supplied by the carriers and (2) at the same time to require the refund provision in the event that such amounts are ultimately determined to exceed a reasonable level. This, then, is the course that we shall follow.

The process of arriving at an acceptable interim rate requires two steps. The first is to define the basic carrier data that will be employed, and the second is to perform computations using such data.

The data that we will employ is set forth in Appendix 2. For the purposes of the present decision, we have, for the most part, employed the figures supplied by the carriers. Appendix 2 displays this data both in total dollars and in dollars per barrel. The conversion to per-barrel figures is based on the assumption that the normal traffic volume for the beginning years will be 438 million barrels a year (1.2 million barrels a day), and that this number of barrels will be apportioned among the carriers according to their respective ownership shares in the pipeline.

Of the items set forth in Appendix 2, substantial questions have been raised at this stage of the proceeding particularly with regard to removal and restoration costs and depreciation. Removal costs are the costs expected to be incurred at the end of the useful life of the pipeline in order to meet environmental requirements. According to the Alyeska Pipeline Service Company, these costs will amount to about $1.049 billion in 1977 dollars. Some of the carriers propose to simply set aside one twenty-fifth of their total share of this amount each year for 25 years. Others propose more detailed computations to inflate the removal costs to dollar costs for the year 2002, and to allow for compounded interest on the yearly accruals. The protestants, on the other

hand, seek to reduce the yearly removal charges by requiring that they be amortized over a period longer than 25 years.

With respect to depreciation charges, the carriers uniformly propose a 25-year service life, on the basis that known recoverable reserves on the North Slope are expected to be depleted in terms of economic recovery in 25 years. Protestants propose that service lives as long as 35 years be required, on the basis that additional oil fields exist on the North Slope that are likely to extend the pipeline's useful life and that even the present reserve may have a longer life than 25 years.[8]

Both of these issues will receive substantial attention during our formal investigation. However, at this stage of the proceedings, the data presented concerning additional reserves is of a somewhat uncertain nature. We do not deem this data sufficient to warrant a reduction in the amount allowed for depreciation for the purposes of determining the lawfulness of the proposed rates at the suspension level. By the same token, we will not, at this time, compute removal charges over an amortization period of more than 25 years.

For removal costs, we have used the same per-barrel allowance for each carrier, because we see no basis for cost differences among the carriers on this item. Our allowance is based on a simple amortization without inflation or discounting. While this approach may somewhat understate the amounts that need to be accrued, the magnitude of the discrepancy would not be great in terms of the overall tariff computation. It may well be outweighed by overstatement in the depreciation charges.

An additional issue is raised by protestants concerning the investment and valuation figures. It is their conten-

[8] It should be noted that at oral argument several protestants did not dispute the use of 25 years at the suspension level.

tion that these figures are affected by excessive construction costs. Needless to say, this issue will be a major focus of our formal investigation. However, as the protestants themselves concede, this is not a matter that can be properly dealt with at the present stage of the proceeding. Accordingly, the investment figure provided by the carrier will be used at this time. Our valuation staff has used the same data in providing valuation figures for present purposes.

In one aspect, the investment data shown on Appendix 2 differs from figures supplied by certain carriers in that it does not include an amount for working capital. Not all of the carriers reported working capital as part of their investment. Those that did appear to have used no consistent standard. For this reason, and because a satisfactory basis for judging the carriers' working capital needs has not been shown, we have omitted it from the investment figures.[3] We believe that our action in this respect is more than compensated by our liberality in not averaging down the investment figures for depreciation over the first few years.

Having the basic data at hand, we turn now to the question of rate computation.

In justifying the filed tariff rates, the carriers contend that the proposed rates are merely sufficient to cover expenses and interest and to allow an after-tax return on equity equal to 7 percent of their valuation. They consider this method of gauging a return on equity to be permissible since it is used in the 1941 consent agreement between the Justice Department and a large number of shipper-owned pipelines.

However, the consent decree standard has never been employed in a Commission proceeding as the test of rea-

[3] An allowance for working capital has, however been included in the staff evaluation estimates reflected in Appendix 2.

sonableness of rates. Its sole legal status is as a limit on the amount of dividends that pipelines may pay to shipper owners without risking prosecution under the Elkins Act for illegal rebates. Moreover, as a standard of reasonableness, it has nothing to recommend it from a conceptual standpoint. Although valuation is a measure of the entire investment, the consent decree standard allows a return on valuation to be used entirely to compensate one segment of the capital invested. Such a standard can have no relationship, except by coincidence, to the carriers' true capital costs. As shown in Appendix 3, the filed rates would produce returns on equity ranging from 31 percent to 96 percent. Accordingly, it can be seen that the tariff rates would produce returns exceeding capital costs, even where the carriers' own expense and investment data are accepted.

Inasmuch as the carriers' justification does not appear satisfactory, we must next consider what standards would be appropriate based on our own precedents. As we noted in No. 35533, *Petroleum Products, Williams Brothers Pipe Line Company*, —— I.C.C. —— (1976), the standards we have applied in the past have been an 8 percent return on valuation for crude oil pipelines and 10 percent on valuation for petroleum products pipelines.

At the outset, we have questions about the appropriateness of an 8 percent return in this instance, where annual interest rates generally exceed 8 percent. The small margin of earnings in excess of interest that would result is demonstrated in Appendix 4. As may be seen, rates computed on this basis would range from $3.74 for BP to $4.16 for Exxon. Further study of this table shows that five of the eight carriers would have returns on equity of 10 percent or less under this standard, and returns for some would be lower than 3 percent. Such a return would be unreasonably low.

It should be noted that the 8 percent on valuation standard arose in the early 1940's, when capital costs were substantially lower than they are today. It could continue to provide a substantial return on original investment to established carriers, whose valuations have risen well above their actual investment because of inflation. In the case of the TAPS carriers, however, their property was constructed so recently that valuation is little higher than actual cost, and an 8 percent return on valuation becomes quite deficient.

The question arises, then, as to whether the Commission can permissibly depart from its previous standards in these proceedings. The answer lies in the fact that, whatever standards we use, the earnings allowed to the carriers must comply with governing judicial requirements. The controlling standard, set forth in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603, 64 S.Ct. 281, 88 L.Ed. 333 (1944), is that a regulated firm must be allowed enough revenue not only for operating expenses, but also for the capital costs of the business. Such revenue must cover service on the debt and a return on equity sufficient to attract capital. [See also section 15a(2).]

For the purposes of the present decision, we have determined that the standard of a 10 percent return on valuation for petroleum products pipelines is appropriate for the TAPS carriers. Our selection of the 10 percent return on valuation standard is based primarily on two factors. One is that the magnitude and inherent attributes of the TAPS project produce a higher risk factor than is normal in crude oil pipeline operations. Many of the construction features are being tested for the first time. Geographic terrain, environmental and temperature problems, possible earthquakes, vulnerability to sabotage, future oil pricing policies, and regulatory uncertainty are among the factors to be considered. More

over, a 10 percent return on valuation appears generally sufficient to cover estimated capital costs. As previously noted, an 8 percent return on valuation produces generally insufficient returns on equity.

As shown in Appendix 5, a 10 percent return on valuation produces for the individual carriers on their actual capital structure returns on equity ranging from 13.3 percent to 54.3 percent, with no figure for Mobil which claims to be totally debt financed. The composite return on equity is 23 percent.

While these returns on equity have been challenged by protestants, the carriers note that they have an abnormally high proportion of debt in their capital structures, which is made possible by the fact that their debt obligations are unconditionally guaranteed by their parent oil companies. The carriers would argue that tariff rates based on 10 percent return on valuation provide a much lower return on equity with a more normal capital structure.

Although the 10 percent return on valuation appears suitable for present purposes, we stress that it is not intended to be a general standard nor to be a prejudgment of criteria to be used upon the conclusion of the investigation in these proceedings, nor is it in any way to be considered a prejudgment of the issues in Ex Parte No. 308.

Conditions for the acceptance of interim rate filings. The Bureau of Investigations and Enforcement asks that the carriers be required to produce a number of types of documents as a condition to our acceptance of interim rates. The carriers, however, contend that BIE's proposed condition is an attempt to circumvent the Commission's established discovery rules, and should not be adopted.

Order of Interstate Commerce Commission Suspending Tariffs and Authorizing Interim Rates.

We have concluded not to impose the requested condition in the present order. We do not believe that such orders are a necessary subject for inclusion in an order disposing of petitions for suspension of a tariff. Any future request for orders can be handled as separate matters later, when all factors concerning the production of the requested data can be properly considered. In addition, we note that at oral argument, the carriers indicated their willingness to cooperate in the production of documents. We shall expect them to abide by this agreement.

The other condition requested by protestants pertains to possible refunds of excess charges collected. We recognize that even the lower interim rate levels may prove upon investigation to exceed reasonable levels. Therefore, as a condition to filing such interim rates, we will require that the carriers keep account of the amounts collected under the interim rates or the proposed rates should they become effective and that they agree to refund any portion of such amounts that may ultimately be established as excessive.

Immediately prior to the oral argument on June 27, 1977, the Department of Justice filed a memorandum in reply to the responses of the carriers together with a motion for leave to file. Neither the special procedure adopted in this case nor our rules of practice contemplate replies to replies and the motion for leave to file is denied.

In the paragraphs below, the tariffs of Phillips Alaska Pipeline Corporation are not included. As noted in Appendix 1, a separate order with respect to Phillips will be issued before July 20, 1977.

It is ordered, That the operation of the schedules authorized below be, and it is hereby, suspended, and that the use thereof in interstate or foreign commerce be

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deferred from June 30, 1977, and to and including January 29, 1978, except as to I.C.C. 2, published by Amerada Hess, which bears a July 1 effective date and the operation of which is suspended to January 31, 1978, unless otherwise ordered by this Commission;

AMERADA HESS PIPELINE CORPORATION
I.C.C. NO. 2

ARCO PIPE LINE COMPANY
I.C.C. NO. 1030
on page 14, the rate of $6.04

BP INDUSTRIES, INC.
I.C.C. NO. 2

EXXON PIPELINE COMPANY
I.C.C. NO. 125

MOBIL ALASKA PIPELINE COMPANY
I.C.C. NO. 2

SOHIO PIPE LINE COMPANY
I.C.C. NO. 742
on the title page, the rate of $6.16

UNION ALASKA PIPELINE COMPANY
I.C.C. NO. 2

It is further ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates contained in the suspended schedules, as aforesaid, as well as the interim schedules authorized to be filed, pursuant to section 15(1) and section 15(7), with a view to making such findings and orders in the premises as the facts and circumstances shall warrant. In the event the schedules here under investigation are changed, amended or reissued, upon termination of the suspension period and the investigation not having been concluded, such changed, amended or reissued schedules will be included in this investigation.

Order of Interstate Commerce Commission Suspending Tariffs and Authorizing Interim Rates.

It is further ordered, That the investigation in this proceeding shall include all matters and issues with respect to the lawfulness of the said rates under the Interstate Commerce Act.

It is further ordered, That the named carriers be, and they are hereby, authorized to file, upon not less than one day's notice, interim rates not exceeding the following amounts:

Amerada Hess Pipeline Corporation	$4.85
Arco Pipe Line Company	4.91
BP Pipelines Inc.	4.68
Exxon Pipeline Company	5.10
Mobil Alaska Pipeline Company	4.84
Sohio Pipe Line Company	4.70
Union Alaska Pipeline Company	4.89

subject, however, to the condition that the carriers keep account and that (1) the interim tariffs contain a refund provision to the effect that if the rates charged exceed the rates subsequently authorized or prescribed by the Interstate Commerce Commission, the carriers will refund the difference between the rates charged and any rates which may subsequently be authorized or prescribed by the Interstate Commerce Commission with interest computed in accordance with section 15(8)(e) of the act, added by the Railroad Revitalization and Regulatory Reform Act of 1976; and (2) that the carriers file (effective on not less than 1 day's notice) a similar refund provision applicable to the original proposed rates. Although that section does not apply to pipelines, it represents the latest expression of Congressional interest, and the Commission's notice of April 14, 1977 indicated its applicability to all carriers under Part I. It should also be noted that the carriers at the oral argument expressed assent to an even higher rate of interest in the event of an investigation without suspension. Under the circumstances, we believe interest computed in accordance with section 15(a)(e) would be fair to all parties.

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And it is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be served upon the carriers parties to the said schedules, and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission. (Commissioner Brown approves the order except insofar as it denies the motion of the Department of Justice for leave to file a response to the carriers' responses).

H. G. HOMME, JR.,
Acting Secretary.

[SEAL]

APPENDIX 1

INITIAL TARIFFS APPLICABLE TO THE TRANS ALASKA PIPELINE SYSTEM

Carrier	Tariff No.	Filing Date	Effective Date
Amerada Hess Pipeline Corporation	I.C.C. No. 1 (rules) I.C.C. No. 2 (rate)	June 1, 1977 June 1, 1977	July 1, 1977 July 1, 1977
Arco Pipeline Company	I.C.C. No. 1030	May 27, 1977	June 30, 1977
BP Pipelines, Inc.	I.C.C. No. 1 (rules) I.C.C. No. 2 (rate)	June 3, 1977 June 3, 1977	June 20, 1977 June 30, 1977 [1]
Exxon Pipeline Company	I.C.C. No. 124 (rules) I.C.C. No. 125 (rate)	June 8, 1977 June 8, 1977	June 20, 1977 June 30, 1977
Mobil Alaska Pipeline Company	I.C.C. No. 1 (rules) I.C.C. No. 2 (rate)	June 10, 1977 June 10, 1977	June 20, 1977 June 30, 1977 [1]
Phillips Alaska Pipeline Corporation	I.C.C. No. 1 (rules) I.C.C. No. 2 (rate)	June 20, 1977 June 20, 1977	July 20, 1977 [2] July 20, 1977 [2]
Sohio Pipeline Company	I.C.C. No. 762	June 3, 1977	June 30, 1977 [1]
Union Alaska Pipeline Company	I.C.C. No. 1 (rules) I.C.C. No. 2 (rate)	June 15, 1977 June 15, 1977	June 30, 1977 June 30, 1977

Tariff rules filed by all of the named carriers except Phillips were placed under investigation in No. 36611 by order of the Commission served June 17, 1977. Consideration of the rates filed by those carriers was deferred to the present order.

1. Postponed from June 20, 1977.
2. Because of the later effective date of these tariffs, the time for filing protests and replies to them has not yet expired. The question of their suspension or investigation will be the subject of a separate order by the Commission, to be issued prior to July 20, 1977.

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APPENDIX 2
I & S No. 9164

BASIC CARRIER DATA
(000 omitted)

		EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Operating Costs	Total	$1,920[1]	19,889[1]	6,189[1]	185,200[1]	6,499[1]	419,944
	Per Barrel	.085	.869	.844	.928	.894	.938
Renewal Costs	Total	8,302[2]	8,008[2]	697[2]	13,999[2]	697[2]	41,960
	Per Barrel	.066	.066	.095	.066	.096	.094
Investment	Total	1,627,000[3]	459,920[3]	147,969[3]	3,159,500[3]	142,985[3]	9,258,475
	Per Barrel	20.970	20.082	20.188	21.492	19.665	21.151
Depreciation	Total	73,700[4]	18,000[4]	6,061[4]	138,200[4]	5,750[4]	372,586
	Per Barrel	.941	.926	.884	.884	.791	.851
Debt	Total	1,431,250[5]	459,600[6]	139,000[6]	2,707,500[5]	128,439[5]	8,034,480
	Per Barrel	18.559	20.082	16.504	18.541	17.685	18.344
Interest	Total	114,400[4]	32,674[4]	10,125[4]	253,450[4]	9,369[4]	699,525
	Per Barrel	1.507	1.402	1.202	1.729	1.289	1.574
Interest Rate		8.000%[7]	7.111%[7]	8.439%[7]	9.325%[7]	7.295%[7]	8.552%
Equity	Total	406,750[8]	-0-[8]	27,969[8]	431,000[8]	14,546[8]	1,233,996
	Per Barrel	4.632	-0-	3.764	2.951	2.001	2.817
Valuation	Total	1,937,500[9]	494,500[9]	183,200[9]	3,271,000[9]	155,900[9]	9,733,600
	Per Barrel	22.118	21.133	21.758	22.402	21.441	22.223
Debt/Equity		77.9/22.1	100.0/0.0	83.4/16.6	86.3/13.7	89.8/10.2	86.7/13.3

		AM. HESS	ARCO	BP	EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Operating Costs	Total	6,500[1]	90,250[1]	64,727[1]	$1,920[1]	19,889[1]	6,189[1]	185,200[1]	6,499[1]	419,944
	Per Barrel	.899	.981	.988	.085	.869	.844	.928	.894	.938
Renewal Costs	Total	629[2]	8,613[2]	6,668[2]	8,302[2]	8,008[2]	697[2]	13,999[2]	697[2]	41,960
	Per Barrel	.066	.094	.096	.066	.066	.095	.066	.096	.094
Investment	Total	144,681[3]	1,981,850[3]	1,467,240[3]	1,627,000[3]	459,920[3]	147,969[3]	3,159,500[3]	142,985[3]	9,258,475
	Per Barrel	21.923	21.033	21.168	20.970	20.082	20.188	21.492	19.665	21.151
Depreciation	Total	5,784[4]	77,247[4]	69,784[4]	73,700[4]	18,000[4]	6,061[4]	138,200[4]	5,750[4]	372,586
	Per Barrel	.876	.840	.885	.941	.926	.884	.884	.791	.851
Debt	Total	115,997[5]	1,814,687[5]	1,355,947[5]	1,431,250[5]	459,600[6]	139,000[6]	2,707,500[5]	128,439[5]	8,034,480
	Per Barrel	17.898	19.731	18.103	18.559	20.082	16.504	18.541	17.685	18.344
Interest	Total	11,288[5]	140,200[4]	110,889[4]	114,400[4]	32,674[4]	10,125[4]	253,450[4]	9,369[4]	699,525
	Per Barrel	1.718	1.524	1.714	1.507	1.402	1.202	1.729	1.289	1.574
Interest Rate		9.651%[7]	7.729%[7]	9.466%[7]	8.000%[7]	7.111%[7]	8.439%[7]	9.325%[7]	7.295%[7]	8.552%
Equity	Total	27,074[8]	110,963[8]	211,293[8]	406,750[8]	-0-[8]	27,969[8]	431,000[8]	14,546[8]	1,233,996
	Per Barrel	4.121	1.379	3.045	4.632	-0-	3.764	2.951	2.001	2.817
Valuation	Total	140,000[9]	2,036,000[9]	1,541,900[9]	1,937,500[9]	494,500[9]	183,200[9]	3,271,000[9]	155,900[9]	9,733,600
	Per Barrel	22.664	22.196	22.214	22.118	21.133	21.758	22.402	21.441	22.223
Debt/Equity		81.2/18.8	89.0/11	85.6/14.4	77.9/22.1	100.0/0.0	83.4/16.6	86.3/13.7	89.8/10.2	86.7/13.3

Order of Interstate Commerce Commission
Suspending Tariffs and Authorizing Interim Rates.

FOOTNOTES TO BASIC CARRIER DATA

Amerada Hess

1. Reported in undated statement submitted by Amerada Hess entitled "General Assumptions for Calculating TAPS Tariff as of May, 1977."
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Amerada Hess' ownership share (1.50 percent).
3. Amerada Hess' share (1.50 percent) of Alyeska investment ($7,959 million for facilities plus $16 million for land), plus Amerada Hess' capitalized construction interest ($22,670,500) and capitalized overhead costs ($1,735,400) as reported by letter from R. K. Stafford dated May 13, 1977.
4. Reported in letter from R. K. Stafford dated June 1, 1977.
5. Reported in "General Assumptions" statement.
6. Reported in "General Assumptions" statement.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Arco

1. Reported in letter from J. D. Wessling dated June 1, 1977.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Arco's ownership share (21 percent).
3. Arco's share (21 percent) of Alyeska investment ($7,959 million for facilities, plus $16 million for land), plus Arco's capitalized construction interest ($257,100,000), as reported in letter from J. D. Wessling dated June 1, 1977.
4. Reported in letter dated June 1, 1977.
5. Interest divided by interest rate.
6. Reported in June 1, 1977 letter.
7. Weighted average interest rate of debt issues shown in a letter from J. D. Wessling dated June 2, 1977.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

BP

1. Reported in BP's submission of June 15, 1977, in explanation of filed tariff rates.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by BP's ownership share (15.84 percent).
3. BP's share (15.84 percent) of Alyeska investment ($7,959 million for facilities plus $16 million for land), plus BP's capitalized

construction interest and overhead costs ($204 million), with the latter as reported in BP's submission of June 15, 1977.
4. Reported in BP's submission of June 15, 1977.
5. Investment less equity.
6. Reported in a leter from P. H. Jones dated May 27, 1977.
7. Interest divided by debt.
8. Reported in a letter from P. H. Jones dated June 14, 1977.
9. Staff estimate based on reported investment figures.

Exxon

1. Reported in Appendix A to Exxon's reply to protests.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Exxon's ownership share (20 percent).
3. Exxon's share (20 percent) of Alyeska investment ($7,959 million for facilities, plus $16 million for land), plus Exxon's capitalized construction interest ($242 million), with the latter as reported in a letter from J. D. Sturtevant dated March 21, 1977.
4. Reported in a letter from J. D. Sturtevant dated June 1, 1977.
5. Interest divided by interest rate.
6. Reported in Appendix A to Exxon's reply to protests.
7. Reported in Appendix A to Exxon's reply to protests.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Mobil

1. Reported in a letter from C. R. Thompson dated May 27, 1977.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Mobil's ownership share (5 percent).
3. Mobil's investment, including capitalized construction interest ($57.7 million) and capitalized overhead costs ($3.2 million) as reported in a letter from C. R. Thompson dated April 29, 1977.
4. Reported in letter dated May 27, 1977.
5. Debt presumed to be 100 percent of investment. Data filed by Mobil gives no indication of equity financing.
6. Reported in letter dated May 27, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Phillips

1. Reported in a letter from James Mullen dated July [sic; June] 20, 1977.

2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Phillips' ownership share (1.66 percent).
3. Phillips' share (1.66 percent) of Alyeska investment ($7,959 million for facilities plus $16 million for land), plus Phillips' capitalized construction interest ($14,944,000) and capitalized overhead costs ($40,000), with the latter items as reported in letter of June 20, 1977. Working capital ($1,480,000) excluded.
4. Reported in undated statement entitled "Phillips Petroleum Company—Estimate of Expenses."
5. Reported in letter of June 20, 1977.
6. Reported in letter of June 20, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Sohio

1. Reported in a letter from J. T. Boltacz dated June 13, 1977.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Sohio's ownership share (33.34 percent).
3. Sohio's investment (3,138.5 million) as reported in letter dated June 13, 1977. Working capital ($13 million) excluded. Subtracting Sohio's share of Alyeska investment would indicate $479,635,000 as capitalized construction interest and overhead costs.
4. Reported in letter dated June 13, 1977.
5. Reported in letter dated June 13, 1977.
6. Reported in letter dated June 13, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Union

1. Reported in a letter dated May 27, 1977, from E. J. Takach.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Union's ownership share (1.66 percent).
3. Union's share (1.66 percent) of Alyeska investment ($7,975 for facilities plus $16 million for land), plus Union's capitalized construction interest ($10.6 million), with the latter as reported in a letter from David M. Schwartz dated June 14, 1977.
4. Reported in letter dated May 27, 1977.
5. Reported in letter dated June 14, 1977.
6. Computed from debt description in letter dated June 14, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

APPENDIX 3
EFFECTS OF FILED TARIFF RATES

I & S No. 9164

	AMERADA HESS	ARCO	BP	EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Revenue (Rate)	6.440	6.040	6.350	6.270	6.310	6.220	6.160	6.090	6.211
Less:									
Operating Costs	.969	.981	.933	.935	.899	.844	.926	.894	.938
Depreciation	.876	.840	.862	.841	.826	.834	.864	.791	.851
Removal Costs	.096	.096	.096	.096	.096	.096	.096	.096	.096
Less Interest	1.718	1.524	1.714	1.307	1.492	1.393	1.729	1.289	1.574
Less Taxes	1.461	1.375	1.452	1.535	1.585	1.615	1.346	1.598	1.456
Return on Equity	1.300	1.224	1.293	1.456	1.412	1.438	1.199	1.422	1.296
Percentage Returns:									
On Equity	31.5%	96.2%	42.5%	31.4%	(no equity)	38.2%	40.6%	71.1%	46.0%
On Total Investment	13.8%	13.1%	14.2%	13.2%	13.8%	14.0%	13.6%	13.8%	13.6%
On Valuation	13.3%	12.4%	13.5%	12.5%	13.1%	13.0%	13.1%	12.7%	12.9%

I&S No. 9164

APPENDIX 4
TARIFF COMPUTATION
ALLOWING 8 PERCENT RETURN ON VALUATION—ACTUAL CAPITAL STRUCTURE

	AM HESS	ARCO	BP	EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Revenue (RATE)	3.861	3.965	3.739	4.160	3.908	3.805	3.749	3.975	3.892
Less:									
Operating Cost	.969	.981	.933	.935	.899	.844	.926	.894	.938
Depreciation	.876	.840	.862	.841	.826	.834	.864	.791	.851
Removal Costs	.096	.096	.096	.096	.096	.096	.096	.096	.096
Less Interest	1.718	1.524	1.714	1.307	1.492	1.393	1.729	1.289	1.574
Less Tax	.107	.277	.071	.519	.312	.390	.071	.479	.229
Return on Equity	.095	.247	.063	.462	.278	.348	.063	.426	.264
Percentage Returns:									
On Equity	2.3%	19.4%	2.1%	10.0%	(no equity)	9.2%	2.1%	21.3%	7.2%
On Total Investment	8.3%	8.4%	8.4%	8.4%	8.4%	8.0%	8.3%	8.7%	8.4%
On Valuation	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%

Order of Interstate Commerce Commission Suspending Tariffs and Authorizing Interim Rates.

APPENDIX 5
TARIFF COMPUTATION
ALLOWING 10 PERCENT RETURN ON VALUATION—ACTUAL CAPITAL STRUCTURE

	AM. HESS	ARCO	BP	EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Revenue (Pets)	4.547	4.906	4.651	4.330	4.342	4.529	4.700	4.885	4.335
Less:									
Operating Costs	.969	.961	.968	.985	.990	.941	.935	.964	.968
Depreciation	.276	.340	.302	.241	.228	.254	.264	.791	.851
Removal Costs	.046	.096	.096	.096	.096	.096	.096	.096	.096
Less Interest	1.712	1.534	1.714	1.807	1.492	1.283	1.729	1.289	1.574
Less Taxes	.616	.775	.589	1.016	.909	.579	.574	.960	.728
Return on Equity	.543	.600	.507	.905	.720	.783	.511	.855	.643
Percentage Returns:									
On Equity	13.50%	64.26%	14.65%	19.54%	(no equity)	20.50%	17.25%	42.73%	28.00%
On Total Investment	10.94%	10.54%	10.50%	10.59%	10.54%	10.74%	10.42%	10.90%	10.50%
On Valuation	10%	10%	10%	10%	10%	10%	10%	10%	10%

Affidavit of C. R. Thompson, Controller and Treasurer of Mobil Alaska Pipeline Co., in Support of Application for Temporary Restraining Order, July 6, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted In Printing]

AFFIDAVIT

CHARLES R. THOMPSON, being duly sworn, deposes and says

1. I am a Certified Public Accountant and Controller and Treasurer of Petitioner Mobil Alaska Pipeline Company and make this affidavit in support of the Application for Temporary Restraining Order and Application and Motion for Interlocutory Injunction filed herewith.

2. I have examined the Interstate Commerce Commission's Order of June 28, 1977, in No. 36611 ("Order") and the petitions and protests of the State of Alaska and the Arctic Slope Regional Corporation. Based on the differences between the carrier-initiated TAPS rates suspended in the Order and the "interim" rates authorized therein, I have prepared Appendix A to petitioner's memorandum in support of its applications for temporary restraining order and interlocutory injunction.

3. I computed for each TAPS owner the difference between its own rate (Column 2) and the "interim" rate authorized in the Order (Column 3). The reduction in the rate to the Commission's "interim" rate, expressed in dollars per barrel of crude oil shipped, for each TAPS owner is set forth in Column 4.

4. Assuming a throughput of 1.2 million barrels per day through TAPS for a period of seven months (210 days), I computed the total barrels of crude which would be shipped through TAPS during a seven-month suspen-

Affidavit of C. R. Thompson, Mobil Alaska.

sion period. Multiplying that figure by the percentage ownership interest of each TAPS owner in TAPS (Column 1) I calculated the barrels each TAPS owner would ship during a suspension period of seven months (Column 5). Multiplying the total barrels for each TAPS owner by that owner's reduction in revenue per barrel I obtained the total revenue reduction for each TAPS owner (Column 6).

5. Based on the assumption that the total reductions in revenue for all TAPS owners, $343,335,000, would cause an equivalent increase in the wellhead value of crude oil, I calculated the total amount of increased revenues to the State of Alaska from the use of the "interim" rates during a seven-month suspension period. Since Alaska owns a 12.5% royalty interest in the wellhead value of crude to be shipped through TAPS, by multiplying 12.5% by the total revenue reduction for TAPS (Column 6) I obtained a figure representing the maximum royalty benefit to the State from operations at the Commission's "interim" rate levels during a seven-month period (Column 7).

6. The Arctic Slope Regional Corporation ("ARSC") has a right to a total of $500,000,000 of Alaska's royalty interest in the wellhead value of the crude accumulated by payment from Alaska of 2% of its own royalty interest (.02 x .125 = .0025 or .25%). By multiplying Column 7 by 2% I obtained a figure representing the maximum benefit to the ARSC from operations at the Commission's "interim" rate levels during a seven-month period (Column 8).

Date: July 2, 1977

CHARLES R. THOMPSON

[Sworn to on July 2, 1977.]

Affidavit of C. R. Thompson, Mobil Alaska.

APPENDIX A

MOBIL ALASKA PIPELINE COMPANY

COMPARISON OF REVENUE REDUCTION AND ROYALTY INCREASE TO ALASKAN NATIVES DURING 7-MONTH SUSPENSION PERIOD RESULTING FROM THE INTERSTATE COMMERCE COMMISSION ORDER 36611 SUSPENDING RATES FILED BY COMPANIES PROPOSING TO OPERATE AS COMMON CARRIERS OVER THE ALASKA PIPELINE SYSTEM AND AUTHORIZING THE FILING OF RATES NOT TO EXCEED STIPULATED AMOUNTS

$ in 000's

	-1-	-2-	-3-	-4-	-5-	-6-	-7-	-8-
		Proposed Tariff vs Authorized $/Bbl					Royalty Increase	
Owner (Carrier)	Owner Percent	Prop.	Auth.	Reduction	Barrel (a) (millions)	Revenue Reduction (4 x 5)	Total 6 x 12.5%	Alaskan Natives Share (d) (7 x 2%)
Amerada Hess Pipeline Corporation	1.50%	$6.44	$4.85	$1.59	3.8	$ 6,010		
Arco Pipe Line Company	21.00	6.04	4.91	1.13	52.9	59,800		
BP Pipelines, Inc.	15.84	6.35	4.68	1.67	39.9	66,661		
Exxon Pipeline Company	20.00	6.27	5.10	1.17	50.4	58,968		
Phillips Alaska Pipeline Corporation	1.66	6.22	(b)	1.36(c)	4.2	5,689		
Sohio Pipe Line Company	33.34	6.16	4.70	1.46	84.0	122,665		
Union Alaska Pipeline Company	1.66	6.09	4.89	1.20	4.2	5,020		
Sub Total	95.00				239.4	$324,813	$40,602	$812
Mobil Alaska Pipeline Company	5.00	6.31	4.84	1.47	12.6	18,522	2,315	46
Total All Carriers	100.00%				252.0	$343,335	$42,917	$858

(a) Based on 1.2 million barrels daily for 7 months (210 days)
(b) Not acted upon yet
(c) Based on weight average reduction for all carriers other than Phillips Alaska Pipeline Corporation
(d) Alaska Natives Claims Settlement Act, USC Sec. 1608

Affidavit of Dale A. Lucas, Manager of Transportation of BP Pipelines Inc., in Support of Application for Temporary Restraining Order, July 11, 1977.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

[Caption Omitted In Printing]

AFFIDAVIT

THE STATE OF TEXAS }
COUNTY OF HARRIS }

DALE A. LUCAS, being duly sworn, deposes and says:

I am Manager of Transportation of BP Pipelines Inc. ("BP"), the petitioner in this proceeding. I make this affidavit in support of BP's motion for an order staying, restraining and suspending an order of the Interstate Commerce Commission which suspends for seven months tariffs filed by BP with the Commission for the transportation of crude oil in the Trans-Alaska Pipeline System ("TAPS").

BP owns an 15.84% undivided interest in TAPS. Schedule A to this affidavit shows projected operating results for BP for its share of TAPS over the seven-month period ending January 31, 1978, the approximate period of the suspension ordered by the I.C.C.

The figures appearing on this Schedule A are compiled from data furnished by BP to the I.C.C., on which the I.C.C. bases the calculations appearing in the appendices to its order now under review.

The figures on Schedule A reflect a build-up over the period covered in the amount of oil to be transported by BP. The I.C.C.'s calculations are based on operation for a full year at a rate which our figures show will not actually be reached until late in the suspension period. By the I.C.C.'s approach, BP would transport about 35 million barrels over the suspension period; actually, as Schedule

Affidavit of Dale A. Lucas, BP Pipelines.

A shows, we estimate BP will transport only 25.75 million barrels over that period, with correspondingly less revenue.

Schedule A shows operating results based on two different tariff rates. The figures in the right-hand column use the $6.35 initial rate tariff filed by BP, which the I.C.C. has suspended. The figures in the left-hand column use the $4.68 rate which the I.C.C. has said it would approve. As Schedule A shows, under the I.C.C. suggested rate BP's revenues would be, over the seven-month suspension period, $43 million less than under BP's suspended tariff.

In fact, as Schedule A shows, the $4.68 tariff will result in a net loss to BP of about $3.6 million over the seven-month suspension period.

D. A. LUCAS

[Sworn to on July 8, 1977.]

Affidavit of Dale A. Lucas, BP Pipelines.

SCHEDULE A

BP PIPELINES INC.

Operating Results for Seven Month
Period Ending January 31, 1978
(Operations Commencing August 1, 1977)
($000)

Line No.	Description	Tariff Rates $4.68	Tariff Rates $6.35
	(a)	(b)	(c)
1	Throughput (thousand barrels)[1]	25,750	25,750
2	Operating Revenue	$120,510	$163,513
3	Operating Expense:		
4	Depreciation[1]	29,901	29,901
5	Dismantling/Restoration[2]	3,323	3,323
6	Other Operating Expenses[1]	33,052	33,052
7	Net Carrier Operating Income	$ 54,234	$ 97,237
8	Interest Expense[1]	57,833	57,833
9	Income Tax	—	20,840
10	Net Income (Loss)	$ [3,599]	$ 18,564

NOTES:

1. 1977 figure reported to the I.C.C., plus 1/12 of 1978 figure reported to the I.C.C. (as presented in explanation of initial tariff, dated June 15, 1977).

2. One-half annual amount applied by I.C.C. in Order of June 28, 1977.

Affidavit of Richard M. Voripaieff, Vice President—Administration and Treasurer of Exxon Pipeline Company, in Support of Motion for Expedited Consideration or, in the Alternative, for a Stay Pending Review, July 12, 1977.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

[Caption Omitted in Printing]

AFFIDAVIT

STATE OF TEXAS
COUNTY OF HARRIS

RICHARD M. VORIPAIEFF, being duly sworn, deposes and says:

That I am the Vice President—Administration and Treasurer of Exxon Pipeline Company.

That, to the best of my knowledge, information and belief as of the time Exxon Pipeline Company filed its I.C.C. Tariff No. 125, the anticipated revenue barrels to be transported through its undivided interest share of the capacity of the Trans Alaska Pipeline System for the period from July 26, 1977, through January 29, 1978, were as shown on Table 1 attached to this Affidavit. Since the filing of I.C.C. Tariff No. 125, an industrial accident occurred resulting in the loss of certain critical facilities at one of the pipeline system's pump stations. Thus, the anticipated revenue barrels for the period July 26, 1977, through January 29, 1978, will be substantially less than the previous estimate.

That, to the best of my knowledge, information and belief, the figures and calculations shown in Tables 2 and 3 attached to this Affidavit are correct.

RICHARD M. VORIPAIEFF

[Sworn to on July 11, 1977.]

Affidavit of R. Voripaieff, Exxon Pipeline.

TABLE 1

Exxon Pipeline Company
TAPS Anticipated Revenue Barrels
July 26, 1977 Through January 29, 1978

Scheduled Throughput

Date	Thousand Barrels
7-26	128
7-27	160
7-28	176
7-29	182
7-30	182
7-31	185
8-1	185
8-2	190
8-3	195
8-4	200
8-5	205
8-6	210
8-7	215
8-8	220
8-9	225
8-10	230
8-11	235
8-12	240
8-13 through 12-31-77	33,840
Total	37,403
Less: 10% for TAPS downtime, fuel and other factors	3,740
Working inventory in terminal tankage at 3 days throughput	720
Total Revenue Barrels Through 12-31-77	32,943
1-1-78 Through 1-29-78	6,960
Less: 5% for TAPS downtime, fuel and other factors	348
Total Revenue Barrels 1-1 through 1-29-78	6,612
Total Revenue Barrels During Period	39,555

Affidavit of R. Voripaieff, Exxon Pipeline.

TABLE 2

Minimum Rate for the Period June 30, 1977 through January 29, 1978 Using ICC Method Adjusted to Reflect Anticipated Throughput

	M $	$/bbl.
Return on Valuation @ 10% (includes both net income after taxes and gross interest expense)	$ 99.8	$2.520
Operating Expenses	25.8	.651
Ad Valorem Taxes	14.4	.363
Book Depreciation	36.6	.924
TAPS Dismantling	4.3	.109
Provision for Income Taxes	46.6	1.177
Total Revenue	$227.5	$5.744

Affidavit of R. Voripaieff, Exxon Pipeline.

TABLE 3

Minimum Rate for the Period June 30, 1977 through January 29, 1978 Using ICC Method Adjusted to Reflect Anticipated Throughput, Anticipated Dismantling Expense, and Anticipated Income Taxes

	M $	$/bbl.
Return on Valuation at 10% (includes both net income after taxes and gross interest expense)	$ 99.8	$2.520
Operating Expense	25.8	.651
Ad Valorem Taxes	14.4	.363
Book Depreciation	36.6	.924
TAPS Dismantling	8.1	.205*
Provision for Income Taxes	46.9	1.187**
Total Revenue	$231.4	$5.850

* Based on $16.4 million annual removal costs for Exxon prorated on the basis of an average throughput of 211,000 barrels per day for the interim period (total revenue barrels of 39,555,000 for Exxon as shown in Table 1).

** Based on increased dismantling expenses shown above.

"Appendix A" to Memorandum of Exxon Pipeline Co. In Support of Application for Injunction: Verified Statement of Ernest C. Terry, C.P.A. of Exxon Pipeline Co. Describing Calculation of Tariff Rates for Trans Alaska Pipeline as Submitted to Interstate Commerce Commission, July 12, 1977.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

STATEMENT OF ERNEST C. TERRY

My name is Ernest C. Terry. I am employed by Exxon Pipeline Company. I graduated from Southern University in New Orleans in 1964 with a bachelor of Science degree in Accounting. Following graduation, I was employed for three years with the Kaiser Aluminum and Chemical Corporation as a Cost Accountant. In 1967, I joined Johnson and Johnson as a Supervisory Accountant. In May 1969, I was employed by the Humble Oil & Refining Company (now Exxon Company, U.S.A., a division of Exxon Corporation) as a Budget and Cost Accountant in the Production Department and was later transferred to the Controller's corporate staff. Subsequently, I was assigned to the Marketing Department as a Financial Reporting Supervisor. In 1976, I was employed by the Exxon Pipeline Company. In my various assignments, I have had experience in long-range forecasting, investment evaluation and financial analysis, both near-term and long-term.

I am a Certified Public Accountant (CPA), and member of the American Institute of Certified Public Accountants and the National Association of Black Accountants.

In my present assignment, my duties include budget development, long-range financial planning and development of tariff rates for Exxon Pipeline Company's interest in the Trans Alaska Pipeline System.

In my statement, I will describe the procedure employed in the computation of the initial tariff rate filed by Exxon

Pipeline Company. Specifically, my testimony will cover (1) computation of an estimated ICC valuation, (2) description of the elements used in the development of the rate, (3) computation of the rate and (4) the latest earnings forecast for Exxon Pipeline Company attributable to its interest in the Trans Alaska Pipeline System for the years 1977 and 1978 based on the rate filed.

The initial rate was developed and computed using the traditional guidelines of the Interstate Commerce Commission as described to me by the Exxon Pipeline Company legal advisors, applying, however, an earnings limitation of 7% on estimated ICC valuation consistent with the Pipeline Consent Decree.

It was necessary to compute an estimated ICC valuation for Exxon Pipeline Company's interest in the Trans Alaska Pipeline System in order to compute an initial tariff rate. In computing the estimated ICC valuation, the general guidelines reported by the Interstate Commerce Commission in Ex Parte No. 308 as shown in the testimony of Jesse C. Oak, Senior Valuation Engineer, Bureau of Accounts, of the Interstate Commerce Commission were followed. Attachment I to this statement shows the computation of the estimated ICC valuation used for the 1978 computation. The estimated valuation for Exxon Pipeline Company's 20% interest in the Trans Alaska Pipeline System is $1,976.5 million. The general guidelines given by Mr. Oak, his description of the elements of valuation and the method used by Exxon Pipeline Company to estimate valuation are:

(1) Cost of Reproduction New. Mr. Oak described this as "the estimated cost of reproducing substantially the identical or similar property constructed in a prior period at a price level as of a subsequent

date." Attachment II shows the computation of an estimated cost of reproduction new. Column 1 shows original cost by year of expenditure and Exxon Pipeline Company's 20% share. To this 20% share, estimated interest capitalized during construction was added. Column 2 lists the annual indices issued by the Interstate Commerce Commission for the years 1969 through 1975 and estimated indices for the years 1976 through 1978. The indices for 1976 through 1978 were estimated by compounding the 1975 index by 6% inflation factor. Column 3 is the reciprocal of Column 2. Column 4 reflects the 1947 Period Prices calculated by multiplying Column 1 times Column 3. Column 5, 1977 Period index, was determined by taking the average of the annual indices for the five-year period, 1974 through 1978. Column 6 shows the computation of the estimated cost of reproduction new for the Trans Alaska Pipeline System and Exxon Pipeline Company's 20% share. An interest amount was added to this 20% share. Two factors were considered in calculating the interest:

(a) a predetermined annual interest rate, and

(b) an estimated construction period.

The annual interest rate presently allowed by the ICC for this purpose is six (6) percent. The construction period considered was approximately 39 months. The interest additive was arrived at by applying six (6) percent for one-half of the construction period plus three months to the cost of reproduction new. The estimated cost of reproduction new for Exxon Pipeline Company's interest in the Trans Alaska Pipeline System is $1,877.0 million.

Verified Statement of E. Terry, Exxon Pipeline.

(2) Cost of Reproduction New Less Depreciation. Mr. Oak described this as "a value arrived at after giving consideration to the effects of observed physical wear, decay and functional inadequacy or obsolescence." Since the Trans Alaska Pipeline System is a newly constructed pipeline facility, the cost of reproduction new less depreciation was assumed to be the same as cost of reproduction new.

(3) Original Cost. Mr. Oak described the original cost as "the actual cost of construction or acquisition of property to the first person or corporation dedicating such property to public use." Exxon Pipeline Company used the original cost number received from Alyeska Pipeline Service Company. These estimated costs were furnished to the Commission by letter dated April 27, 1977 and are shown on Attachment III. More recent estimates from Alyeska Pipeline Service Company show these costs to be slightly higher. Nevertheless, for the purpose of our estimate we have used the estimate previously provided the Interstate Commerce Commission.

(4) The Present Value of Land. Mr. Oak described this as "a present fair average market value of all parcels of land owned or used by a carrier in common carrier services." For the purpose of this estimate, the original cost of land as reported by Alyeska Pipeline Service Company was used. Exxon Pipeline Company's share of this cost was $.6 million dollars and consistent with Mr. Oak's guidelines, half of this amount was used in estimating an initial valuation.

(5) Present Value of Rights of Way. Mr. Oak described this as "the unamortized balance of carrier's cost paid for an easement across a landowner's property." For the purpose of this estimate, Exxon Pipeline Company's share of the original costs of rights of way were used. This amount was $.2 million.

Verified Statement of E. Terry, Exxon Pipeline.

(6) Working Capital. Mr. Oak described working capital as consisting of "investment in material and supplies suitable and intended for maintenance and operation and a fund of money necessary to meet current operating demands which much be supplied in addition to the receipts of common carrier operations." In Exxon Pipeline Company's letter to the Interstate Commerce Commission of June 1, 1977 (Attachment IV), working capital was estimated to be $8 million and this was used in estimating valuation.

(7) Going Concern Value. Mr. Oak described this as "an intangible value of an assembled and established pipeline doing business, as compared with one which has not yet commenced operation." Mr. Oak stated in his testimony that the Commission has used in pipeline valuation 6% of the value of depreciable property before adding the amount for present value of land, present value of rights of way and working capital. Exxon Pipeline followed this procedure in estimating valuation.

Using the estimated valuation, a tariff rate was calculated for a full year's operation at the maximum throughput levels. At the time the tariff rate was calculated, the Trans Alaska Pipeline System was expected to receive line fill on June 20, 1977. Because of the uncertainty of initial throughput and operating conditions through year end

1977, a rate based on 1977 was not calculated. A comparable rate for that period would be higher than a tariff rate during a full year of operation. A rate of $6.53 per barrel was computed for the year 1978. Attachment V shows the computation of that rate.

The elements that were used in developing the 1978 rate were:

(1) *Operating Expenses*

Sheet 3 of Attachment IV shows the forecasted expenses for 1978. Operating expenses are composed of Alyeska Pipeline Service Company's estimated field and administrative costs, Exxon Pipeline Company's estimated cost of fuel for operations, ad valorem taxes and other required support costs. Details of the estimated operating expenses for 1978 were sent to the Interstate Commerce Commission in Exxon Pipeline Company's letter dated June 1, 1977. The more significant elements of each expense item are:

(a) Field and administrative costs include all costs items to be incurred such as personnel costs, catering, maintenance contracts, maintenance materials, commercially purchased fuel and power, communications, equipment and building rentals. Maintenance services will be primarily performed by outside contractors.

(b) Fuel Furnished in Kind. Exxon Pipeline forecasts that its share of natural gas requirements in 1978 will be 1.5 billion cubic feet. Exxon Pipeline's share of fuel extracted from topping plants for 1978 are forecasted to be approximately

.3 million barrels. This latter requirement will be secured from shippers in Exxon Pipeline's capacity. Tariff rules and regulations require payment to the shippers.

(c) Exxon Pipeline Company will require office personnel, data processing service, and other services to support the operation of the Trans Alaska Pipeline System. These costs are estimated at $725M dollars for 1978.

(d) Ad valorem taxes were estimated at 2% of gross investment in property, plant and equipment.

(2) *Depreciation*

Depreciation was calculated using the straight line method and a 25-year life. Details on the computation of depreciation were sent to the Interstate Commerce Commission by Exxon Pipeline Company's letter of April 27, 1977. (See Attachment III.) Cost of depreciable assets were computed to be $1,842.4 million. This includes Exxon Pipeline Company's 20% share of the latest estimated depreciable construction costs from Alyeska Pipeline Service Company of $8,003 million and includes $241.7 million which represents Exxon Pipeline Company's interest capitalized during construction.

(3) *Dismantling and Restoration*

The Federal and State of Alaska right-of-way permits require that upon the completion of use the permittees shall remove all aboveground facilities and restore the right of way to a condition satisfactory

to the Department of Interior and the State of Alaska. Assuming that all buried pipe can be left in place, Alyeska has estimated that the total cost in 1977 dollars to meet this requirement is $1,049 million (Exxon Pipeline's share is $209.8 million in 1977 dollars). Based on a six percent per annum inflation factor, Exxon Pipeline estimates this future cost to be $4,052 million (Exxon Pipeline's share is $900.4 million).

An amount required to recover these costs has been include in the rate in a manner that will result in no gain or loss to Exxon Pipeline. The amount to be included was calculated using sinking fund tables and an estimated earnings rate of 6% after income taxes on the reinvestment of funds collected. This earnings rate is essentially equivalent to the return available on high-grade tax-exempt municipal securities. On this basis, Exxon Pipeline will only collect $212.5 million after income taxes from shippers to fund a total cost before tax of $900.4 million.

(4) *Interest Expense*

Interest expense was included based on an Exxon Pipeline average interest rate of 8% on outstanding debt invested in its share of the Trans Alaska Pipeline System. For 1978, debt is estimated to be 80% of total capital expenditures including interest capitalized during construction.

(5) *Income Taxes*

Provision is made for income taxes taking into consideration a Federal tax rate of 48% and a State of Alaska tax rate of 9.4%.

(6) *Earnings on ICC Valuation*

For 1978, provision is made for earnings at 7% on Exxon Pipeline Company's estimated Interstate Commerce Commission's valuation for its interest in the Trans Alaska Pipeline System.

The tariff rate of $6.53 for the year 1978 as shown on Attachment V was computed by dividing the annual revenues by the throughput volumes for 1978. Throughput volume used for 1978 was 240,000 barrels per day, which represents Exxon Pipeline Company's 20% share of the initial design rate of the Trans Alaska Pipeline System of 1,200,000 barrels per day.

The $6.53 rate computed for 1978, if established as the initial rate, could require a reduction as of January 1, 1979 depending on the facts at that date. The adjustment would be required because of changes in expenses and the amount required to keep earnings within the 7% pipeline Consent Decree dividend limitations. To avoid the necessity of such an early change, the rate was computed which would allow Exxon Pipeline Company to maintain an earnings level that provides are reasonable return on the estimated valuation by limiting the earnings to the permissible dividend level under the three year carry forward provision for deficiencies as permitted by the pipeline Consent Decree. For the purpose of computing a rate on this basis, the first four full years, 1978-1981 was selected as the rate period. An ICC valuation for each of the additional three years was estimated in the same manner as the 1978 estimated valuation which was described earlier. Using these valuations and the same elements used in the 1978 rate computation, a rate of $6.27 was computed as shown on Attachment VI.

Verified Statement of E. Terry, Exxon Pipeline.

Throughput volumes for the four year period were calculated by using Exxon Pipeline Company's 20% share of the current design capacity of the Trans Alaska Pipeline System of 1,200,000 barrels per day for the years 1978 through 1980. Exxon Pipeline Company is currently forecasting an expansion of the system which, considering the necessary construction period, would be completed and available for service on July 1, 1981. For 1981, Exxon Pipeline Company throughput volumes were calculated at 240,000 barrels per day from January 1, 1981 to June 30, 1981 and 308,600 barrels per day from July 1, 1981 through December 31, 1981. Operating expenses for the years 1979, 1980 and 1981 were forecasted considering the mid-year 1981 expansion and by escalating the 1978 operating expense forecast made by Alyeska at 5% per year compounded.

For the year 1981, an additional amount of depreciation was added to cover the incremental cost of the expansion which is estimated at $90.7 million of which $81 million represents construction costs and $9.7 million represents interest capitalized. This latter capitalization was then depreciated over 21.2 years which represents the remaining life of the system at the time of the expansion.

The dismantling and restoration costs remain the same as 1978. Interest expense for the years after 1978 were calculated by retiring debt with 90% of the cash flow from book depreciation and deferred income taxes.

Using the $6.27 filed rate, a forecast of earnings was made for the remaining portion of 1977 and for the year 1978. In developing and computing the $6.27 rate, no provisions were made for the loss of revenues due to system downtime and other factors that could result in less than

Verified Statement of E. Terry, Exxon Pipeline.

100% of expected throughput. For the purpose of forecasting financial results for the remaining portion of 1977 and 1978, we estimate throughput at 90% of capacity for 1977 due to the uncertainties of start up and operating conditions; for the year 1978, a 95% factor was used. Attachment VII shows the forecast of revenues and expenditures for 1977 and 1978. The rate of return on estimated ICC valuation expected for the remaining portion of 1977 is 5.4% and the rate of return on estimated ICC valuation for the full year 1978 is 5.8%.

Verified Statement of E. Terry, Exxon Pipeline.

ATTACHMENT I

ESTIMATED INITIAL VALUATION

		$M
1.	Original Cost (Including Interest Capitalized)	$1,835.9
2.	Reproduction Cost New	$1,877.0
3.	Total of 1 and 2	$3,712.9
4.	Reproduction Cost New, less depreciation	$1,877.0
5.	Ratio of 1 to 3	49.45%
6.	Ratio of 2 to 3	50.55%
7.	Multiply 1 by 5	$ 907.8
8.	Multiply 2 by 6	$ 948.8
9.	Total of 7 and 8	$1,856.6
10.	Condition Per Cent (4 divided by 2)	100.0%
11.	Value of Depreciable Property (Multiply 9 by 10)	$1,856.6
12.	Going Concern and Other Intangibles (6% × 11)	$ 111.4
13.	Present Value of Land ($.6 M × ½)	$ .3
14.	Present Value of Rights-of-Way ($.2)	$ .2
15.	Working Capital	$ 8.0
16.	Estimated Valuation	$1,976.5

Verified Statement of E. Terry, Exxon Pipeline.

ATTACHMENT II

EXXON PIPELINE COMPANY
ESTIMATED "COST OF REPRODUCTION NEW" OF
TAPS PHASES I AND II

Year	(1) $M Expend.(1)	(2) Indices	(3) Reciprocal of Column 2	(4) $M 1947 Period Prices (Col 1x3)	(5) 1977 Period Index	(6) $M CRN (Col 4x5)
1969	35.0	191	.524	18.3	355	65.0
1970	180.0	198	.505	90.9	355	322.7
1971	109.0	211	.474	51.7	355	183.5
1972	49.0	221	.452	22.1	355	78.5
1973	47.0	235	.426	20.0	355	71.0
1974	856.0	279	.358	306.5	355	1,088.1
1975	2,772.0	343	.292	809.4	355	2,873.4
1976	2,653.0	364	.275	729.6	355	2,590.1
1977	1,270.0	386	.259	328.9	355	1,167.6
1978	———	409				———
Subtotal	7,971.0					8,439.9
EPC's 20% Share	1,594.2					1,688.0
Capitalized Interest	241.7				Interest	189.0
Total Original Cost	1,835.9				Total CRN	1,877.0

(1) Excluding land ($3.0 M) and right of way ($1.0 M)

Verified Statement of E. Terry, Exxon Pipeline.

ATTACHMENT III

[LETTERHEAD OF EXXON PIPELINE COMPANY]

April 27, 1977

Re: ACA/RJL

Mr. John A. Grady, Director
Bureau of Accounts
Interstate Commerce Commission
Washington, D. C. 20423

As requested in Mr. Ronald Young's letter of January 4, 1977, we are submitting our views on the Trans Alaska Pipeline System (TAPS) service life and estimated cost as of December 31, 1977. These details are shown on Attachments I and II.

In response to your other questions, we offer the following information:

1. Known recoverable reserves from the Prudhoe Bay Field (Sadlerochit Reservoir) are estimated at 9.6 billion barrels, including condensates and gas liquids, as reported in Appendix B, page 83, of the latest edition of the API-AGA publication, "Reserves of Crude Oil, Natural Gas Liquids and Natural Gas in the U.S. and Canada", dated December 31, 1975. Although other commercial reserves could be discovered or developed in the area tributary to TAPS some time in the future, such discoveries are speculative and cannot now be classified as known recoverable reserves for this purpose. TAPS service life should be based on presently known recoverable reserves and adjusted if and when additional or new reserves are discovered and proven in the area tributary to TAPS.

Verified Statement of E. Terry, Exxon Pipeline.

2. The anticipated annual throughput, based on Prudhoe Bay Field reserves, is shown on Attachement III. Use of the Mortada estimate as indicated on the table should not be construed to imply agreement with other elements of the study.

3. We understand that you define the minimum annual economic throughput level as being the level at which cash inflow from tariff charges will be equal to cash needed to cover out-of-pocket expenses. Since this information is to be used by the ICC to determine service life for depreciation, we submit that the minimum economic throughput level thus defined is not relevant. Instead, the facilities should be depreciated over a period during which the Owner can expect to earn a fair return based upon ICC valuation, giving proper consideration to the high level of risk inherent in the construction and operation of TAPS under the facts and circumstances. We estimate that a fair rate of return can no longer be earned when throughput declines to a level of 200-300 HBPD.

We would like to emphasize that estimating this throughput level for TAPS is extremely difficult and to a large degree is arbitrary because it depends upon estimating several factors for a period many years in the future such as a) the level of pipeline operating and maintenance costs and expenses in a totally new and radically difficult environment for a pipeline that is subject to rigorous government specifications and oversight, b) the impact of inflation on such costs and expenses, and c) the maximum tariff rates that the ICC will approve and shippers will be able to pay considering producers' operating expenses and prices being paid or permitted for crude oil in the fields connected.

Verified Statement of E. Terry, Exxon Pipeline.

4. Based on the throughput profile shown on Attachment III and the position stated in the answer to question 3, we estimate the economic ownership life of the TAPS system at no more than 25 years. At the end of that time, throughput is expected to be down to 240,000 barrels per day and declining. At or below that throughput level, it is likely that shippers would not be able to pay the tariff rates required to keep the pipeline in operation were the depreciation charges still a major factor of costs.

As you know, the U.S. pipeline industry has no experience in operating a pipeline of the design and in an environment similar to that existing for TAPS. Under these conditions, maintenance problems and costs are extremely difficult to predict, and we think the costs of prolonging the life of the pipeline in excess of 25 years might be prohibitive at such low throughput levels.

5. Provisions in the Federal and State right of way permits require that the Owners of TAPS, upon completion of the use of all or a very substantial part of the right of way, remove the improvements and equipment installed thereon and restore the environment to an approved condition. While this cost is not epected to be expended until about the year 2002, it is a constractual commitment of the Owners that was essential to TAPS' construction. Accordingly, it must be recognized as a cost of operating the System.

Since this cost is expected to exceed any net salvage credits accruing to the project, we propose that the cost of dismantling and environmental restoration be accounted for separately from depreciation in order to preclude negative net plant investment balances later in the life of TAPS. Accordingly, zero salvage should be assumed for depreciation purposes.

Alyeska is currently making a study of TAPS abandonment, salvage and environmental restoration costs. This

Verified Statement of E. Terry, Exxon Pipeline.

information should be available about May 1, 1977, and will be provided as soon thereafter as possible.

6. We understand that the ICC is currently considering the unit of production (throughput) method as a possible alternative to straight-line depreciation for TAPS. Considering the probable throughput buildup and decline for this system, as shown in Attachment III, we have no objection to the application of the unit of production method for TAPS. The unit of production method would more closely match depreciation expense with the revenues generated by line throughput and thus minimize the extent to which tariffs would have to be adjusted from time to time. To be consistent, the unit of production method would also be used to accrue the reserve for dismantling, abandonment, and environmental restoration. Should additional recoverable oil reserves be developed that are tributary to and delivered into TAPS, the unit of production basis would be adjusted accordingly.

Several of the TAPS owner-company representatives will be in Washington on May 2 and May 3 and will be available to discuss the above matters with you and Mr. Young at your convenience.

J. D. STURTEVANT

JDS:hm
Attachments
bcc + atts.: Messrs. G. E. Uthlaut
R. R. Die
F. L. Heard, Jr.
H. P. Luckett
M. J. Brady
E. C. Buettner
F. M. Fleming
A. O. Hinkle (3)

Interstate Commerce Commission – Depreciation Study
Trans Alaska Pipeline System – Estimated Cost as of 12-31-7
(Millions of Dollars)

NAME OF CARRIER
EXXON PIPELINE COMPANY.

ATTACHMENT I

Primary Account No.	PRIMARY ACCOUNT TITLE	12-31-77 Book Cost (Estimated as of 4-25-77)	Estimated Net Salvage (%) (Col. 3 Sch. 2 divided by Col. 1)	Service Value (%) (100% Minus % (Col. 2))	Weighted Avg. Yr. Installed (Col. 8 Sch. 2)	Weighted Avg. Estimated Yr. of Retirement (Col. 7 Sch. 2 by Col. 1)	Weighted Avg. Whole Life (Col. 5 Minus Col. 4)	Annual Composite Rate (Col. 3 divided by Col. 6)	Actual Accrual (%) (Col. 1 times Col. 7)
		(1)	(2)	(3)	(4)	(5)	(6)	(7)*	(8)
		E.P.C.'s 20%							
182	Right of Way	.2	-0-	100%	1977	2002	25 yrs.	4.0%	-
183	Line Pipe	28.2	-0-	100%	1977	2002	25 yrs.	4.0%	1.1
184	Line Pipe Fittings	7.6	-0-	100%	1977	2002	25 yrs.	4.0%	.3
185	Pipelines Construction	1108.6	-0-	100%	1977	2002	25 yrs.	4.0%	44.3
186	Buildings	45.8	-0-	100%	1977	2002	25 yrs.	4.0%	1.8
187	Valves	2.4	-0-	100%	1977	2002	25 yrs.	4.0%	.1
188	Pumping Equipment	15.4	-0-	100%	1977	2002	25 yrs.	4.0%	.6
189	Working Tools and Machinery	-	-	-	-	-	-	-	-
190	Other Station Equipment	102.0	-0-	100%	1977	2002	25 yrs.	4.0%	4.1
191	Oil Tanks	9.2	-0-	100%	1977	2002	25 yrs.	4.0%	.4
192	Delivery Facilities	264.2	-0-	100%	1977	2002	25 yrs.	4.0%	10.6
193	Communication Systems	.6	-0-	100%	1977	1987	10 yrs.	10.0%**	.1
194	Office Furniture and Equipment	.2	-0-	100%	1977	2002	25 yrs.	4.0%	-
195	Vehicles and Other Work Equipment	10.0	-0-	100%	1977	1980-85	3-8 yrs.	13.2%** Composite	1.3
	E.P.C. Capitalized Interest (This will be allocated to above accounts at later date.)	241.7	-0-	100%	1977	2002	25 yrs.	4.0%	9.7
	TOTAL	1836.1							74.6

* NOTE 1: If unit of production (throughput) method is used, the composite depreciation rate in this colum would be approximately $1.00 per bbl. using the projected production volume) shown on Attachment III.

** NOTE 2: Some shorter life for accounts 193 and 195 expected in final analysis. EPC's present rates used for illustrative purposes only

OF THE TRANS ALASKA PIPELINE SYSTEM AS OF DECEMBER 31, 1977
AS REPORTED BY ALYESKA PIPELINE SERVICE COMPANY
AS AGENT FOR CONSTRUCTION FOR OWNERS

ATTACHMENT II

(See footnotes which are a part of statement)

	Expenditures as of 12/31/76	Expenditures Year 1977	Expenditures Year 1978	Expenditures Year 1979	Expenditures Year 1980	Expenditures Year 1981	Expenditures Year 1982	Expenditures Year 1983	Accumulated Expenditures as of 12/31/76	Estimated Expenditures Year 1977	Estimated Expenditures Year 12/31/
	Millions of Dollars										
ACCOUNT											
181 Land											
182 Right of way											
183 Line pipe											
184 Line pipe fittings											
185 Pipeline construction											
186 Buildings											
187 Valves											
188 Pumping equipment											
190 Other station equipment											
191 Oil tanks											
192 Delivery facilities											
193 Communication system											
194 Office furniture & equipment											
195 Vehicles & other work equipment											
TOTAL											

Footnotes:

1. This schedule reflects a tentative classification of the estimated construction costs of the Trans Alaska Pipeline System (TAPS). The costs included are those construction costs recorded by, or estimated accounts to be recorded by, Alyeska Pipeline Service Company as Construction Agent for the TAPS Owners and do not include capitalized interest and financing costs or other capitalized costs pertaining to an individual Owner which such Owner may have recorded in its book of accounts.

2. The TAPS facilities are jointly owned by the following companies, each of them own an undivided interest in the TAPS facilities in the percentage as indicated:

Amerada Hess Pipeline Corporation	1.50	Exxon Pipeline Company	20.00
ARCO Pipe Line Company	21.00	Mobil Alaska Pipeline Company	5.00
BP Pipelines Inc.	15.54	Phillips Petroleum Company	1.66
Exxon Pipeline Company	20.00	Sohio Pipe Line Company	31.78
		Union Alaska Pipeline Company	1.66

3. The estimated construction costs as of December 31, 1977, are the budget amounts approved by the Owners on April 25, 1977 and are for the completion of TAPS to an initial design capacity of 1.8 million barrels per day. These budget amounts do not include provisions for contingencies or unknown final engineering or construction changes or adjustments.

4. The Interstate Commerce Commission Uniform System of Accounts for Pipeline Companies provides that the cost of carrier property under construction is to be recorded in Account 107, Construction work in progress. When construction work is completed, the costs included in this account are to be transferred to the appropriate primary property accounts. The classification of estimated costs as reflected by this schedule is tentative and for information purposes only. Ultimate classification of actual expenditures into the appropriate primary property accounts may vary significantly from this presentation.

5. Alyeska Pipeline Service Company has received cost for projected TAPS construction costs in billion of dollars as follows:

Construction costs expended through March 1977	$7.6B
Projected net expenditures April 1977 to December 31, 1977	.6B
Total estimated construction costs	$8.2B

Verified Statement of E. Terry, Exxon Pipeline.

ATTACHMENT III

TAPS ANTICIPATED ANNUAL THROUGHPUT

	Million Barrels	MMBPD Equivalent
1977	72	0.60*
78	438	1.20
79	438	1.20
80	548	1.50
81	548	1.50
82	548	1.50
83	548	1.50
84	548	1.50
85	548	1.50
86	518	1.42
87	476	1.30
88	442	1.21
89	405	1.11
90	377	1.03
91	347	0.95
92	318	0.87
93	296	0.81
94	268	0.73
95	240	0.66
96	213	0.58
97	193	0.53
98	170	0.47
99	146	0.40
2000	126	0.35
01	105	0.29
02	88	0.24
	8,964	

* Average rate for last four months of 1977.

SOURCE: "The Determination of Equitable Pricing Levels for North Slope Alaskan Crude Oil" dated November 1976 (Mortada Study), Table VI-2, with minor adjustments for 1977 and 1979 throughput volumes to reflect our current estimates of dates of initial startup and completion of first expansion. The throughput estimates in excess of 1.2 MMBD shown above for the years 1980-1988 reflect the assumption that TAPS capacity will be expanded by 1980; however, there is no agreement among the TAPS Owners for such an expansion at this time.

Verified Statement of E. Terry, Exxon Pipeline.

ATTACHMENT IV

June 1, 1977

Mr. John A. Grady, Director
Bureau of Accounts
Interstate Commerce Commission
Washington, D.C. 20423

As requested in Mr. J. Richard Berman's letter of May 11, 1977, we are submitting Exxon Pipeline Company's projected operating expenses applicable to our 20% undivided interest ownership in the Trans Alaska Pipeline System for the calendar year 1978. Since the major portion of costs related to the start-up of TAPS will have been expended in 1977, the calendar year 1978 estimates represent costs for a more normal level of operations. These estimates are reflected in Attachment 1.

In response to Mr. Berman's other questions, we offer the following information:

1) Latest projections by Alyeska indicate that the first oil will be received into the Trans Alaska Pipeline System at Prudhoe Bay by July 1, 1977. The initial pipeline fill rate will be approximately 300,000 barrels per day, with deliveries into tankers at Valdez beginning in August 1977. It is expected that the throughput will increase gradually, reaching 1.2 million barrels per day, which is the design capacity of the present System, in September 1977.

2) Information concerning our assumptions as to the service life of TAPS, including a projected throughput profile, was contained in our letter dated April 27, 1977.

3) Alyeska has estimated the cost to remove the above ground TAPS facilities and restore the environment to an approved condition at $1.049 billion (in 1977 dollars),

Verified Statement of E. Terry, Exxon Pipeline.

EPC's 20% share of which is $210 Million. We believe that the ultimate cost of this effort to be incurred at the end of the life of TAPS, after allowing for inflation, should be provided for ratably over the life of TAPS and accounted for separately from the depreciation reserve. We plan to include an appropriate charge in our initial TAPS tariff and to account for this accrual using accounts 660 (debit) and 63 (credit).

4) The projected operating expenses for 1978 included in Attachment 1 represent Exxon Pipeline Company's 20% share of Alyeska's latest Operating Budget dated May 16, 1977. To these amounts we have added our own estimates of expenses to be incurred by Exxon Pipeline Company and allocable to our ownership in TAPS. Also included in the attachment are our estimated interest expenses for 1978.

5) Our assumptions regarding the throughput to be used in computing our initial TAPS tariff are not yet finalized.

6) Exxon Pipeline Company's estimate of Working Capital relating to TAPS to be included in EPC's valuation as of January 1, 1978 is $8 Million.

Original Signed

J. D. STURTEVANT

JDS/MJB/ems

Attachment
cc: Messrs. G. E. Uthlaut
R. R. Die
F. L. Heard, Jr.
R. H. Voripaieff

Verified Statement of E. Terry, Exxon Pipeline.

ATTACHMENT

EXXON PIPELINE COMPANY
ESTIMATED OPERATING EXPENSES
TRANS ALASKA PIPELINE SYSTEM
YEAR 1978
(Thousands of Dollars)

Account No.	Name	20% of Expenses Incurred By Alyeska On Behalf of Owners	Expenses Incurred By EPC	Total Estimated Expenses
	OPERATIONS			
300	Salaries and Wages	1,841.0	-	1,841.0
310	Supplies and Expenses	1,183.6	-	1,183.6
320	Outside Services	1,094.2	-	1,094.2
330	Operating Fuel and Power	5,705.6	4,500.0	10,205.6
340	Oil Losses and Shortages	-	-	-
	Total Operations	9,824.4	4,500.0	14,324.4
	MAINTENANCE			
400	Salaries and Wages	1,328.6	-	1,328.6
410	Supplies and Expenses	783.4	-	783.4
420	Outside Services	15,483.6	-	15,483.6
430	Maintenance Materials	1,732.2	-	1,732.2
	Total Maintenance	19,327.8	-	19,327.8
	GENERAL			
500	Salaries and Wages	3,579.4	395.0	3,974.4
510	Supplies and Expenses	1,351.6	50.0	1,401.6
520	Outside Services	4,860.6	140.0	5,000.6
530	Rentals	1,466.6	30.0	1,496.6
540	Depreciation and Amortization	-	73,700.0	73,700.0
550	Pensions and Benefits	1,231.6	110.0	1,341.6
560	Insurance	800.0	-	800.0
570	Casualty and Other Losses	-	-	-
580	Pipeline Taxes	456.6	31,900.0	32,356.6
	Total General	13,746.4	106,325.0	120,071.4
	OTHER			
650	Interest Expense	1,860.8	114,500.0	116,360.8
660	Provision for removal and restoration	-	16,400.0	16,400.0
	Total Other	1,860.8	130,900.0	132,760.8
	GRAND TOTAL	44,759.4	241,725.0	286,484.4

6/1/77

ATTACHMENT V

EXXON PIPELINE COMPANY'S TAPS TARIFF COMPUTATION - 1978

	M$ Amount
Revenue	572.0
Operating Expense	
Alyeska Field and Administrative	44.8
Topping Plant Fuel and Natural Gas	4.5
Exxon Pipeline Company Administrative	.7
Ad Valorem Taxes	31.9
Book Depreciation	73.7
TAPS Dismantling	16.4
Interest Expense	114.5
Taxable Income	285.5
Provision For Income Taxes	147.2
Earnings	138.3
Throughput - MB	87.60
ICC Valuation	1,976.5
Return on Valuation - %	7.5
Tariff Rate - $/bbl.	6.53

ATTACHMENT VI

EXXON PIPELINE COMPANY'S TAPS TARIFF COMPUTATION

	M$				
	1978	1979	1980	1981	1978-1981 Average
Revenue	572.0	567.4	563.2	571.5	568.7
Operating Expense					
Alyeska Field and Administrative	44.8	47.0	49.4	57.1	49.6
Topping Plant Fuel and Natural Gas	4.5	4.6	4.7	6.1	5.0
Exxon Pipeline Company Administrative	.7	.7	.8	.8	.8
Ad Valorem Taxes	31.9	31.9	31.9	32.8	32.1
Book Depreciation	73.7	73.7	73.7	75.8	74.2
TAPS Dismantling	16.4	16.4	16.4	16.4	16.4
Interest Expense	114.5	106.7	98.7	92.6	103.2
Taxable Income					287.4
Provision for Income Taxes					149.1
Earnings					138.3
Throughput - MB	87.60	87.60	87.60	100.22	90.75
ICC valuation					1,976.3
Return on Valuation - %					7.0
Tariff Rate - $/bbl.					6.27

Verified Statement of E. Terry, Exxon Pipeline.

ATTACHMENT VII

FORECAST OF EXXON PIPELINE COMPANY'S
TAPS EARNINGS FOR THE YEARS 1977 AND
1978 AT A RATE OF $6.27

	1977 M$ Amount	1978 M$ Amount
Revenue	206.6	521.8
Operating Expense	21.9	50.0
Ad Valorem Taxes	11.8	31.9
Bood Depreciation	30.7	73.7
TAPS Dismantling	6.8	16.4
Interest Expense	49.3	114.5
Taxable Income	86.1	235.3
Provision for Income Taxes	41.3	120.6
Earnings	44.8	114.7
Throughput - MB	32.9	83.2
ICC Valuation	1,976.5	1,976.5
Return on Valuation - %	5.4	5.8

Verified Statement of E. Terry, Exxon Pipeline.

VERIFICATION

STATE OF TEXAS }
COUNTY OF HARRIS }

ERNEST C. TERRY, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

ERNEST C. TERRY

Subscribed and sworn to
before me this 21st day
of June 1977.

DELLA HEURING,
Notary Public in and for
Harris County, Texas.

DELLA HEURING
My Commission Expires 10-31-78.

"Appendix B" to Memorandum of Exxon Pipeline Co. In Support of Application for Injunction: Letter of Chairman Stafford, ICC, To Rep. Hungate Enclosing Corrections To "Hungate Report" July 12, 1977.

LETTERHEAD OF INTERSTATE COMMERCE COMMISSION

March 22, 1976

Honorable William L. Hungate
Chairman
Subcommittee on Activities of
Regulatory Agencies
Committee on Small Business
House of Representatives
Washington, D.C. 20515

Dear Chairman Hungate:

By letter of November 10, 1975 to you, I answered certain questions contained in your letter of October 7, 1975. These answers provided supplemental information on several items covered in my testimony before the Subcommittee on October 2, 1975. The answer to question No. 5 provided figures on the average return on investment for companies owning oil pipelines for the last five years. Since that information was forwarded, it has been discovered that there is a discrepancy in the data for "Rate of Return on Valuation, Year-1972." This was caused by inadvertently picking up from the wrong year the net income (or loss) figure.

We have made the necessary corrections to the affected schedules, schedules I and IV, and I am enclosing copies of those corrected schedules. I request that these schedules be substituted for the corresponding schedules that are presently contained in the answer to question No. 5.

I regret this mistake, and I hope that we have discovered it in time to have it corrected on the record. Please let me know if I can assist you any further in this matter.

Sincerely yours,

GEORGE M. STAFFORD
Chairman

Enclosures

Letter of ICC Chairman to Congressman Hungate.

SCHEDULE I

OIL PIPE LINE COMPANIES—RATES OF RETURN ON VALUATION
YEARS 1970 THRU 1973

FROM SUPPORTING SCHEDULES II THRU V

Name of Company	1970	1971	1972	1973
1. Acorn Pipeline Company	16.58	16.96	16.42	14.20
2. Allegheny Pipeline Company	5.72	5.38	3.89	4.72
3. American Petrofina Co. of Texas, Products Pipeline Dept.	6.62	—	—	—
4. Amoco Pipeline Company	7.61	7.75	7.24	6.77
5. Arapahoe Pipe Line Company	1.45	2.11	1.32	0.85
6. Arco Pipe Line Company	4.25	3.72	3.54	3.93
7. Ashland Pipe Line Company	4.96	6.70	6.93	5.12
8. Atlantic Pipe Line Company[1]	4.09	—	—	—
9. Badger Pipe Line Company	6.51	7.47	8.32	6.80
10. Belle Fourche Pipe Line Company	—	—	—	10.81
11. Black Lake Pipe Line Company	4.90	2.62	2.65	4.83
12. Buckeye Pipe Line Company	4.00	3.60	3.75	4.08
13. Butte Pipe Line Company	4.72	3.89	3.88	9.61
14. Calnev Pipe Line Company	11.63	13.05	11.61	8.89
15. Cherokee Pipe Line Company	4.12	3.44	3.18	1.27
16. Chevron Pipe Line Company	5.60	5.98	6.30	5.64
17. Cheyenne Pipe Line Company	7.15	—	7.08	7.52
18. Chicep Pipe Line Company	—	(1.15)	(1.17)	2.58
19. Cities Service Pipe Line Company	6.96	7.45	5.82	6.60
20. Collins Pipe Line Company	—	—	—	4.84
21. Colonial Pipe Line Company	5.00	4.07	3.62	3.94
22. Continental Pipe Line Company	5.05	6.29	7.69	7.45
23. Cook Inlet Pipe Line Company	6.89	8.69	9.87	8.49
24. CRA, Inc.	1.77	0.49	1.17	(1.11)
25. Crown Central Pipe Line and Transportation Company	21.11	(1.63)	(25.69)	(9.09)
26. Crown-Rancho Pipe Line Corp.	21.34	19.38	18.69	17.70
27. Diamond Shamrock Corp. Products Pipe Line Dept.	0.19	(1.93)	(0.43)	(0.85)
28. Dixie Pipeline Company	5.14	5.27	6.32	4.56
29. Emerald Pipe Line Corp.	3.80	4.34	5.68	6.82
30. Eureka Pipeline Company	2.57	1.70	4.16	(0.18)
31. Exxon Pipe Line Company[2]	6.85	5.55	6.20	6.35
32. Four Corners Pipe Line Company	2.38	1.93	1.43	0.40
33. Gulf Refining Company	3.85	3.12	4.05	4.27

Letter of ICC Chairman to Congressman Hungate.

SCHEDULE I

OIL PIPE LINE COMPANIES—RATES OF RETURN ON VALUATION
YEARS 1970 THRU 1973

FROM SUPPORTING SCHEDULES II THRU V

Name of Company	1970	1971	1972	1973
34. Hess Pipe Line Company	3.30	2.95	(0.25)	1.68
35. Hydrocarbon Transportation, Inc.	1.86	1.01	2.75	3.21
36. Jayhawk Pipe Line Corporation	4.03	3.35	3.30	4.52
37. Jet Lines, Inc.	0.93	2.19	2.91	2.34
38. Kaneb Pipe Line Company	4.58	5.29	6.10	5.34
39. Kaw Pipe Line Company	3.01	4.77	3.59	2.88
40. Kenai Pipe Line Company	2.93	—	—	—
41. Kerr-McGee Pipeline Corp.	—	—	—	7.25
42. Lake Charles Pipe Line Company	5.33	4.29	6.63	5.63
43. Lakehead Pipe Line Co., Inc.	3.82	4.32	5.06	5.65
44. Laurel Pipe Line Company	2.68	1.80	0.71	2.05
45. Mapco, Inc.	2.98	3.68	4.01	2.61
46. Marathon Pipe Line Company	3.18	3.92	5.06	3.60
47. Michigan-Ohio Pipeline Corp.	2.81	1.60	0.59	1.14
48. Mid-Valley Pipeline Corp.	4.72	5.13	5.16	4.65
49. Minnesota Pipe Line Company	14.95	15.67	13.28	10.38
50. Mobil Pipe Line Company	3.92	4.00	3.44	3.33
51. National Transit Company	1.79	(0.69)	—	—
52. Ohio River Pipe Line Company	(4.23)	(3.55)	0.22	(3.40)
53. Okan Pipeline Company[3]	5.77	3.48	3.57	35.95
54. Olympic Pipe Line Company	4.59	5.00	3.52	3.30
55. OMR Pipe Line Company[4]	7.04	8.27	—	—
56. Paloma Pipe Line Company	11.22	16.98	13.93	12.25
57. Panotex Pipe Line Company	1.50	—	—	—
58. Phillips Petroleum Company Products Pipe Line Dept.	9.01	7.02	8.31	8.87
59. Phillips Pipe Line Company	6.20	—	5.91	5.08
60. Pioneer Pipe Line Company	8.00	8.35	9.87	9.11
61. Plantation Pipe Line Company	3.57	4.24	2.65	3.08
62. Platte Pipe Line Company	5.95	5.24	5.30	6.44
63. Portal Pipe Line Company	2.98	3.73	3.74	3.82
64. Portland Pipe Line Corp.	4.69	4.15	4.07	3.79
65. Pure Transportation Company	5.93	7.47	7.53	6.49
66. Shamrock Pipe Line Corp.	4.35	3.71	3.08	3.96
67. Shell Pipe Line Corp.	5.71	5.84	5.39	4.74

Letter of ICC Chairman to Congressman Hungate.

SCHEDULE I

OIL PIPE LINE COMPANIES—RATES OF RETURN ON VALUATION
YEARS 1970 THRU 1973

FROM SUPPORTING SCHEDULES II THRU V

Name of Company	1970	1971	1972	1973
68. Skelly Pipe Line Company	2.38	5.24	4.82	(3.53)
69. Sohio Pipe Line Company	2.62	3.75	3.79	5.29
70. Southcap Pipe Line Company	0.45	4.11	4.01	5.22
71. Southern Pacific Pipe Line, Inc.	8.24	8.62	8.40	9.10
72. Sun Oil Line Co. of Michigan	—	2.65	9.04	4.26
73. Sun Pipe Line Company	4.69	7.07	6.29	5.35
74. Tecumseh Pipe Line Company	1.41	1.29	2.74	6.71
75. Texaco-Cities Service Pipe Line Company	2.23	1.94	1.48	0.46
76. Texas Eastern Transmission Co.	4.33	—	4.15	—
77. Texas Pipe Line Company	5.86	5.76	6.08	4.38
78. Texas-New Mexico Pipe Line Co.	5.74	4.88	5.14	5.22
79. Trans-Mountain Oil Pipe Line Corp.[5]	17.73	17.49	21.53	20.46
80. Trans-Ohio Pipeline Company	1.17	2.59	11.26	14.43
81. UCAR Pipeline Inc.	—	—	—	(1.80)
82. Wabash Pipe Line Company[6]	0.91	1.76	1.67	—
83. West Emerald Pipe Line Corp.	6.29	5.87	3.28	3.00
84. West Shore Pipe Line Company	7.19	7.48	6.10	4.16
85. West Texas Gulf Pipe Line Company	5.98	5.80	6.54	6.06
86. White Shoal Pipeline Corp.	16.20	11.96	12.43	15.45
87. Williams Pipe Line Company	3.36	3.08	3.41	3.61
88. Wolverine Pipe Line Company	0.51	1.95	0.36	0.77
89. Wyco Pipe Line Company	3.91	5.75	7.19	6.35
90. Yellowstone Pipe Line Company	6.44	7.85	6.74	6.11
Average—All Companies	4.73	4.71	4.69	4.68

1. Merged with Arco Pipe Line Company in 1971.
2. Name changed from Humble Pipe Line Company.
3. Major portion of carrier's properties sold to Okie Pipe Line Company in 1973. Net income reflects income from properties not included in valuation rate base determined by the Commission as of 12-31-73.
4. Merged with Sun Pipe Line Company in 1972.
5. Carrier is controlled by Trans Mountain Pipe Line Company, a Canadian corporation, through ownership of all the outstanding capital stock.
6. Merged with Marathon Pipe Line Company as of close of business 12-31-72.

NOTE—1974 Valuation Reports were not available to calculate a rate of return.

Letter of ICC Chairman to Congressman Hungate.

SCHEDULE IV

OIL PIPE LINE COMPANIES—RATE OF RETURN ON VALUATION
YEAR—1972

(000 omitted)

Name of Company	Valuation of Carrier Property[1]	Net Income (or Loss)[2]	Rate of Return on Valuation (Col. 3 ÷ Col. 2)
(1)	(2)	(3)	(4)
1. Acorn Pipeline Company	$ 2,466	$ 405	16.42
2. Allegheny Pipeline Company	10,801	420	3.89
3. Amoco Pipe Line Company	214,193	15,509	7.24
4. Arapahoe Pipe Line Company	22,250	293	1.32
5. Arco Pipe Line Company	166,359	5,896	3.54
6. Ashland Pipe Line Company	57,886	4,010	6.93
7. Badger Pipe Line Company	13,410	1,116	8.32
8. Black Lake Pipe Line Company	9,307	247	2.65
9. Buckeye Pipe Line Company	162,718	6,106	3.75
10. Butte Pipe Line Company	15,650	607	3.88
11. Calnev Pipe Line Company	13,848	1,608	11.61
12. Cherokee Pipe Line Company	28,039	892	3.18
13. Chevron Pipe Line Company	90,901	5,726	6.30
14. Cheyenne Pipe Line Company	3,544	251	7.08
15. Chicap Pipe Line Company	24,976	(292)	(1.17)
16. Cities Service Pipe Line Company	24,999	1,455	5.82
17. Colonial Pipeline Company	480,458	17,416	3.62
18. Continental Pipeline Company	66,861	5,139	7.69
19. Cook Inlet Pipe Line Company	36,108	3,563	9.87
20. CRA, Inc.	4,881	57	1.17
21. Crown Central Pipe Line and Transportation Company	109	(23)	(25.69)
22. Crown-Rancho Pipe Line Corp.	1,525	285	18.69
23. Diamond Shamrock Corporation	19,048	(81)	(0.43)
24. Dixie Pipeline Company	48,637	3,075	6.32
25. Emerald Pipe Line Corporation	1,056	60	5.68
26. Eureka Pipeline Company	6,246	(260)	(4.16)
27. Exxon Pipe Line Company	238,670	14,804	6.20
28. Four Corners Pipe Line Company	32,489	464	1.43
29. Gulf Refining Company	135,754	5,496	4.05
30. Hess Pipe Line Company	20,433	(52)	(.25)
31. Hydrocarbon Transportation, Inc.	74,831	2,057	2.75

Letter of ICC Chairman to Congressman Hungate.

SCHEDULE IV

OIL PIPE LINE COMPANIES—RATE OF RETURN ON VALUATION
YEAR—1972

(000 omitted)

Name of Company	Valuation of Carrier Property[1]	Net Income (or Loss)[2]	Rate of Return on Valuation (Col. 3 ÷ Col. 2)
(1)	(2)	(3)	(4)
32. Jayhawk Pipe Line Corporation	13,118	433	3.30
33. Jet Lines, Inc.	4,153	121	2.91
34. Kaneb Pipe Line Company	31,369	1,915	6.10
35. Kaw Pipe Line Company	5,048	181	3.59
36. Lake Charles Pipe Line Company	4,011	266	6.63
37. Lakehead Pipe Line Co., Inc.	297,709	15,055	5.06
38. Laurel Pipe Line Company	37,687	268	0.71
39. Mapco, Inc.	124,601	4,994	4.01
40. Marathon Pipe Line Company	83,637	4,234	5.06
41. Michigan-Ohio Pipeline Corp.	5,746	34	0.59
42. Mid-Valley Pipeline Corp.	62,587	3,227	5.16
43. Minnesota Pipe Line Company	16,342	2,170	13.28
44. Mobil Pipe Line Company	200,709	6,910	3.44
45. Ohio River Pipe Line Company	1,844	4	0.22
46. Okan Pipeline Company	5,018	179	3.57
47. Olympic Pipe Line Company	32,799	1,154	3.52
48. Paloma Pipe Line Company	5,542	772	13.93
49. Phillips Petroleum Company	11,322	941	8.31
50. Phillips Pipe Line Company	102,636	6,067	5.91
51. Pioneer Pipe Line Company	6,293	621	9.87
52. Plantation Pipe Line Company	214,799	5,683	2.65
53. Platte Pipe Line Company	52,091	2,760	5.30
54. Portal Pipe Line Company	16,366	612	3.74
55. Portland Pipe Line Corporation	43,133	1,756	4.07
56. Pure Transportation Company	40,504	3,050	7.53
57. Shamrock Pipe Line Corporation	10,328	318	3.08
58. Shell Pipe Line Corporation	153,480	8,279	5.39
59. Skelly Pipe Line Company	7,036	339	4.82
60. Sohio Pipe Line Company	35,658	1,353	3.79
61. Southcap Pipe Line Company	27,197	1,091	4.01
62. Southern Pacific Pipe Lines, Inc.	102,047	8,577	8.40
63. Sun Oil Line Company of Michigan	188	17	9.04

Letter of ICC Chairman to Congressman Hungate.

SCHEDULE IV

OIL PIPE LINE COMPANIES—RATE OF RETURN ON VALUATION YEAR—1972

(000 omitted)

	Name of Company	Valuation of Carrier Property[1]	Net Income (or Loss)[2]	Rate of Return on Valuation (Col. 3 ÷ Col. 2)
	(1)	(2)	(3)	(4)
64.	Sun Pipe Line Company	70,287	4,418	6.29
65.	Tecumseh Pipe Line Company	10,595	290	2.74
66.	Texaco-Cities Service Pipe Line Company	38,001	562	1.48
67.	Texas Pipe Line Company	156,857	6,515	4.15
68.	Texas Eastern Transmission Co.	105,309	6,400	6.08
69.	Texas-New Mexico Pipe Line Co.	53,201	2,733	5.14
70.	Trans Mountain Oil Pipe Line Corp.	3,748	807	21.53
71.	Trans-Ohio Pipeline Company	870	98	11.26
72.	Wabash Pipe Line Company	16,675	278	1.67
73.	West Emerald Pipe Line Corp.	1,200	40	3.28
74.	West Shore Pipe Line Company	16,057	979	6.10
75.	West Texas Gulf Pipe Line Co.	34,106	2,231	6.54
76.	White Shoal Pipeline Corp.	2,526	314	12.43
77.	Williams Brothers Pipe Line Co.	229,389	7,828	3.41
78.	Wolverine Pipe Line Company	38,285	138	0.36
79.	Wyco Pipe Line Company	18,051	1,297	7.19

"Appendix A" to Memorandum of Exxon Pipeline Co. In Support of Application for Injunction: Excerpts from Verified Statement of Raymond B. Gary of Morgan Stanley & Co. Inc. on Pipeline Rates of Return in ICC Docket Ex Parte 308, July 12, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATEMENT OF RAYMOND B. GARY
OF MORGAN STANLEY & CO. INCORPORATED

• • •

CAPITAL STRUCTURE OF OIL PIPELINES

Most oil pipelines are highly leveraged, with debt, in the case of new systems, representing initially as much as 90% of total capitalization. Such debt ratios decrease, however, over the life of the particular pipeline. The high degree of leverage exhibited by pipeline companies is a direct outgrowth of the Elkins Act Pipeline Consent Decree entered into in 1941, which limited dividends on pipelines (owned by companies subject to the Consent Decree) to 7% of the ICC valuation of common carrier property owned and used in the business. The 7% figure established in 1941 is, however, unrealistic in terms of financial conditions prevailing today and has led to the financial patterns which have since evolved. In order to maximize returns on total capital within the absolute limit on permissible payouts, pipeline companies were forced to adopt the policy of financing new investments by debt to the greatest extent possible. In essence, the initial debt ratios of pipeline companies are artificially high, and on a stand-alone basis (i.e., without shipper-owner guarantee of debt) would be much lower.

Shipper-owner support of pipelines has enabled pipeline companies to place large amounts of debt, both as to dollar amount and ratio of debt to equity, with private and public

investors at interest costs which reflect the financial strength of the shipper-owners. In contrast, a representative sample of industrial companies indicates a debt ratio (long-term debt as a percent of capitalization) of about 20% for Aaa/AAA (highest grade) companies and a debt ratio of about 43% for Baa/BBB (medium grade) rated companies. Attachment II shows the averages of significant financial statistics for the sample of industrial companies classified by rating levels.

Attachment III sets forth Moody's and Standard & Poor's debt ratings of the 29 petroleum companies covered by The Chase Manhattan Bank's Energy Economics Division's annual *Financial Analysis of a Group of Petroleum Companies* (the "Chase Study"). In my judgment, were this group of companies rated on a composite and weighted basis, the appropriate rating would be Aa/AA. This is the second highest credit rating ("high grade") and is indicative of the advantages shipper-owner support brings to pipeline companies. Attachment III, page 2 sets forth the long-term debt ratios in the years 1971-1975 for the 29 companies in the Chase Study, and shows that it averaged between 21% and 24% in that period.

In the case of oil pipelines, however, debt ratios are higher because of the use of the borrowing capacity of shipper-owners. It must be recognized that lenders are willing to commit funds to the debt securities of oil pipeline companies having such a high degree of leverage *only* because of shipper-owner support, be it direct or indirect (through completion, throughput and cash deficiency agreements). But, as noted above, such shipper-owner support, even if indirect, is in essence an additional equity investment of the parent company. Were support from financially strong shipper-owners not available, lenders would

not permit such a high degree of leverage in oil pipelines even if the relative risk characteristics of the pipeline in question were at the low end of the risk spectrum. Indeed, prior to the existence of the Consent Decree, the average of oil pipeline debt ratios was below 20%. (See Attachment IV for debt ratios of the oil pipeline industry during the 1935-1939 period.)

Because the Consent Decree has resulted in a high degree of leverage in the pipeline industry, each shipper-owner is using up a portion of its available borrowing capacity in support of the pipelines. Not only is the shipper-owner using up its borrowing capacity, which could otherwise have been used elsewhere, but it is also assuming *both* the credit and the business risks of the pipeline. This is a commitment of capital to the total cost of the pipeline, equivalent in substance to a direct equity investment. Consequently, in order to maintain its debt ratio at a level which preserves its financial integrity, the shipper-owner may be forced either to forego other investments or to sell additional equity.

• • •

"Appendix D" to Memorandum of Exxon Pipeline Co. In Support of Application for Injunction: Excerpts from Verified Statement of Ezra Solomon, Stanford University on pipeline rates of return in ICC Docket Ex Parte 308, July 12, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATEMENT OF EZRA SOLOMON

• • • • •

DETERMINING THE RRR FOR OIL PIPELINE

As is true for all long-lived assets, the RRR for petroleum pipelines is equal to the sum of two factors:

(a) The level of the long-term rate of interest, e.g., the Aaa corporate bond rate; and

(b) An allowance for the required risk premium, *i.e.*, the differential risk involved in committing funds to owning and operating pipeline assets *relative* to the risk involved in owning a portfolio of Aaa corporate bonds.

Both factors have changed since 1940, and as a consequence the appropriate RRR for petroleum pipelines has also changed. There are two alternative ways in which the task of resetting those rates can be approached:

(1) We can begin with the 1940-41 decisions and update them to reflect changes which have occurred since those decisions were made.

(2) We can begin afresh and attempt to estimate the risk premium appropriate for pipelines in the light of evidence from the capital markets and what modern capital market theory tells us about these markets. In what follows, both approaches are addressed.

Verified Statement of Ezra Solomon, Stanford University.

UPDATING THE 1940-1941 DECISIONS

In 1941, the average yield to maturity offered by long-term Aaa corporate bonds (as compiled by Moody's) was 2.77 percent. The five year average for the period 1937-41 was somewhat higher, at 3.01 percent. (See Schedule 1 of Appendix A to this statement.) Thus the Commission's decision that 8 percent was an appropriate rate for oil pipelines implies an estimated basic risk premium of 5 percentage points. More risky pipelines (defined at that time as those transporting petroleum products) were allowed an extra 2 percentage point premium over and above the basic 5 percent.

However, circumstances have changed since the Commission made its judgments 35 years ago. In particular:

(1) All observable capital market rates have risen dramatically.

(2) Factors influencing the size of the risk premium on pipeline assets *relative* to high grade corporate bonds have also been changing.

In reviewing the RRR on pipelines in today's context, both elements must be taken into account.

The Rise in Interest Rates

The largest and most obvious change since 1940-41 is that basic interest rates are far higher today. As Schedule 1 of Appendix A shows, the Aaa corporate bond rate was 8.43 percent in 1976, a rise of 5.66 points since 1941 and of 5.09 points from the five year average rate of 1937-41. All other long-term interest rates, including U.S. government bonds, utility bonds, and lower grade corporate bonds, have also risen commensurately (5 or more percentage points) between 1941 and 1976.

In itself, the 5-5½ percentage point increase in basic interest rates would change the RRR on oil pipelines to an equal extent, *i.e.*, the 8 percent rate on oil pipeline should now be adjusted to 13-13½ percent.

The Crude vs. Product Differential

The 1940-41 decisions distinguished between crude oil lines (which were allowed a rate of return about 5 percentage points above the Aaa bond yield) and product lines (which were allowed an extra 2 percentage points above the crude oil pipeline rate). The crude oil lines were then perceived as having lower risk characteristics as compared to product lines. While pipelines today do vary with respect to risk, that original distinction is no longer a valid one. The basic RRR of 13-13½ percent should apply to all minimum risk lines, with the rate for riskier lines scaled upward appropriately to reflect their own particular additional risks, however caused. In terms of risk premium, the RRR on assets of the minimum risk lines should reflect a 5 percentage point risk premium over and above the Aaa corporate bond yield, and the RRR for riskier lines should reflect a correspondingly higher premium.

The Relative Risk of Pipeline Assets vs. Bonds

There are several reasons why investment in the assets of oil pipelines is riskier than investment in a portfolio of high grade corporate bonds.

(1) Bonds offer a highly predictable flow of contractually fixed interest and a date certain for repayment of principal. For Aaa bonds the prospect of default on contractual payments of interest and principal are both extremely low. If default does occur, the bond holders have recourse to properties which have a value which exceeds the amounts due to bond holders by a wide margin.

In contrast, an investment in pipeline assets is subject to far higher uncertainties. There is no contractual commitment that such assets will generate the flow of revenues or benefits originally expected from them. Unexpected declines can and do occur in crude production in the fields served by a pipeline; unexpected changes may also occur in the origin-destination patterns of oil flows; environmental as well as market factors can affect both revenues and costs in adverse ways; future changes in technology and the consequent development or entry of competitive lines or modes can also affect revenues.

(2) Bonds are highly liquid assets. They can be sold or exchanged prior to maturity if the investor chooses to do so. In contrast, a pipeline is a highly specific asset which has less liquidity than almost any asset to be found in society; it is an almost totally inflexible investment in a fixed route, dependent upon continuation of the supply-demand patterns prevailing at the time the line was built. About the only choice available should circumstances turn adverse is for the investor to abandon his assets.

However, there is one dimension of risk for which pipeline assets are less risky than long term bonds, and this is the risk of inflation. As prices rise, bondholders suffer a corresponding decline in the purchasing power of the interest and principal they receive. In short, bondholders have no protection against future inflation. In contrast, receipts from pipeline assets are *partially* protected against the ero-

sion from inflation by the fact that the Commission calculates their property rate base in a way which partially adjusts for inflation, *i.e.*, pipeline assets are valued as a weighted average of their original cost and their cost on an inflation-adjusted basis. Thus, if for example, the average weight given in the formula to the inflation-adjusted cost element is 60 percent over the life of a line, then the investor is protected against 60 percent of the erosion which inflation would otherwise produce in the purchasing power of his allowable return on assets.

The total risk of pipeline assets *relative* to that of high grade bonds is a joint result of all of the foregoing factors. Given the valuation basis used by the Commission, its 1940 judgment was that the proper differential between pipeline assets and high grade bonds was 5 percentage points. On some other valuation basis, that finding would have been higher or lower than 5 percent. Had an original cost rate base been used, the risk premium allowed would have to be higher than 5 percent.

Changes in Relative Risk Since 1941

Has the risk of constructing, owning and operating pipelines changed *relative* to the risk of holding Aaa corporate bonds? Obviously there is no easy answer to this question.

An analysis of the probable *change in relative risk* between 1941 and 1977 contains two elements: (a) an increase (or decrease) in the level of business risk in the pipeline industry (relative to bonds); (b) an increase (or decrease) in the purchasing power risk associated with bond ownership (relative to pipelines).

As far as the first component is concerned, the evidence outlined below suggests that the relative business risk of pipelines is higher today than it was in 1941.

(1) One major business risk for a crude pipeline is that it may lose its source of supply before capital invested in the line has been recouped, *i.e.*, that its economic life might turn out to be shorter than its planned life. This element of uncertainty has clearly increased since 1941 because rising domestic production capability has given way to declining domestic production capability with threats of sharper declines in the future. With rapidly changing patterns of energy supply and distribution, competition from modes servicing alternative sources has increased correspondingly, thus increasing uncertainty.

(2) Uncertainty has also increased because of this nation's increasing reliance on foreign sources of oil, which are subject to curtailment or interruption because of factors beyond our control.

(3) The location of pipelines has been shifting to more difficult terrain. As a result, all of the risks associated with construction and operation are larger on average in 1977 than they were in 1941.

(4) The recent emphasis on absolute environmental safety which did not exist in 1941 has added to the uncertainties both of construction and operation in 1977.

(5) There has been a huge jump in the scale and cost of investments in pipeline projects. When the size of each new investment commitment rises relative to the size of total past commitments, the degree of exposure to risk rises. For example, the perceived risk of placing 1 percent of one's wealth on any particular bet is far smaller than the perceived

risk of placing 100 percent of one's wealth on an identical bet.

Because of the joint effect of all of the factors just enumerated, the differential level of pipeline risk (relative to bond risk) is higher today than it was in 1941.

At the same time, the size of the differential purchasing power risk caused by the fact that inflation hurts bonds more than pipelines has also changed.

Between 1941 and 1961, the U.S. Consumer Price Index rose at a compound annual rate of 3.6 percent per annum. Thus bond holders who purchased a 20-year Aaa corporate bond in 1941 suffered an erosion of 3.6 percent a year in the purchasing power of the stream of proceeds they received from that bond. In contrast, pipelines were partially protected against such an erosion by the fact that the Commission calculates the property rate base for pipelines on a fair value basis. This allows some offset for inflation, since reproduction cost new is weighted into the valuation along with original cost. Let us assume the offset provided by the ICC's valuation methodology was 60 percent on average. In this case, bond holders in 1941 who held bonds till maturity suffered a *purchasing power risk* of 2.16 percent (60 percent of 3.6 percent) a year over the erosion which pipeline owners suffered.

It is not possible to say for certain whether this particular risk is higher today because we do not know for certain what the inflation rate is going to be between 1977 and 1997.

Will it be higher than 3.6 percent a year compounded? If so, the purchasing power risk of the bond holder in 1977 relative to the pipeline owner in 1977 will be higher than it was in 1941. Will the future inflation rate turn out to be lower than 3.6 percent a year compounded? If so, the purchasing power risk of the bond holder in 1977 relative to the pipeline owner in 1977 will be lower than it was in 1941. The fact is that we do not know and cannot know. All we can do is exercise human judgment.

Taking all factors into account, the question of whether the total differential risk of pipeline ownership *relative* to Aaa bond ownershp has changed since 1941 must be answered in the negative: there is no powerful evidence that *on balance* it has gone up a little or down a little.

As a consequence, the tentative results outlined earlier represent as good an estimate as financial theory allows. The proper RRR on valuation for minimum risk pipelines today would be 5 percentage points above the Aaa bond rate, *i.e.*, between 13 and 13½ percent.

EVALUATING THE 5 PERCENT RISK PREMIUM

Can the validity of a 5 percent risk premium for pipeline assets relative to Aaa bonds be evaluated independently? It can. The well-documented evidence now available on risk premiums required by the capital market on equities relative to high grade bonds provides a useful basis for doing so.

Two major studies have been published recently which measure the historic rates of return achieved on portfolios of common stock relative to that achieved on portfolios of high grade bonds. Since stocks and bonds are traded in a single and highly competitive capital market, and since investors are free to adjust equity and bond prices, it can be assumed that the average observed differential (measured over many economic cycles) between the yields on stocks and bonds properly represents the average differential which a rational market requires on equities relative to bonds.

The first study (referred to hereafter as the *Friend* study) is by Professors Irwin Friend and Marshall Blume. It is entitled "The Demand for Risky Assets" and was published in the *American Economic Review,* December 1975. It provides measures of the average yield which investors achieved on (1) a portfolio of high grade bonds and (2) a portfolio of common stocks (defined as all stocks listed on the New York Stock Exchange) for the seventy-year period 1902-1971.

The second study (hereafter referred to as the *Ibbotson* study) is by Professors Roger Ibbotson and Rex Sinquefield. It is entitled "Stocks, Bonds, Bills and Inflation: Year-by-Year Historical Returns 1926-74" and was published in the *Journal of Business,* January 1976. It provides measures of yields achieved by investors on (1) a portfolio of high grade bonds and (2) a portfolio of common stocks (defined as all stocks in the Standard and Poor's 500 stock index) for the period 1926-1974.

The results of both studies for various long run periods are shown in Schedule 2 of Appendix A to this statement. As Schedule 2 shows, the average differential yield required by the market on a portfolio of stocks relative to that on a portfolio of high grade bonds is about 7½ percent per annum.

There is little reason to believe that this 7½ percent historic differential between the rate required on equities and the rate required on high grade bonds has changed. While the *absolute* rates which the market requires on bonds and on equities changes over time because of inflation and other perceived risks, the same set of expectations are built into both rates. Thus both classes of securities may now be riskier than they used to be because of inflationary, political or fiscal expectations, but it is reasonable to assume that the *difference* in risk between the two is essentially unchanged; hence that the historic differential is also unchanged.

Since the rate now required on a portfolio of Aaa bonds is known, we can infer the rate of return required by the market on a portfolio of equities. In 1976 the average market yield on Aaa corporate bonds was 8.42 percent, and in early 1977 it varied between 8 and 8½ percent. Hence the corresponding yield expected on a portfolio of equities today lies between 15½ and 16 percent.

We can use this information in two ways in order to evaluate the judgment that the risk premium on minimum risk pipeline assets relative to a portfolio of bonds now runs about 5 percentage points.

(1) The first, and in my opinion, the superior method, would be to translate the 15½ to 16 percent return required by the market on the portfolio of corporate equities into the corresponding rate on a portfolio of corporate operating assets. The latter number could then be used as a basis for evaluating the appropriate rate of return on pipeline assets.

(2) The second method, which has been widely used in traditional utility regulation, would be to use the 15½ to 16 percent return required on the portfolio of corporate equities to estimate the rate required on the equity invested in pipeline assets. The latter number would then be used to calculate the rate required on pipeline assets.

Method A:

The 15½ to 16 percent return required on the portfolio of corporate equities reflects the operating and market risks

of the underlying assets *plus* the additional financial risk caused by the fact that corporations use long-term debt to finance their investment in assets. In order to translate the 15½ to 16 percent number into a required return on assets, it is necessary to adjust for the effects of financial leverage. The size of the adjustment depends on three factors, all of which can be readily estimated.

(1) The degree of leverage used, *i.e.*, the proportion of long-term debt to total long-term debt and equity. For the universe of non-financial corporations this ratio is around 25 percent.

(2) The rate required on debt financing. Because not all corporate bonds are Aaa rated, the appropriate figure to use is the average yield on corporate bonds. This was 9.01 percent in 1976.

(3) Because interest payments are tax deductible, the corporate tax rate is also relevant. A figure of 48 percent can be used for this purpose.

Combining these three facts, the 15½ to 16 percent rate on equities translates to a required rate on the portfolio of corporate assets of 12¾ to 13¼ percent. This provides a basis for evaluating the rate of 13 to 13½ percent on pipeline assets which we had previously derived. In my opinion, the portfolio of corporate assets is less risky than minimum risk pipelines. Thus, my 13 to 13½ percent figure is supported by the results of Method A.

Method B:

The second method is to use the 15½ to 16 percent equity rate to calculate the weighted average "required rates of return" on the debt and equity components of the capital by

which pipelines are financed. This is the standard method used in "utility regulation" as it is applied to natural gas pipelines, electric power utilities and telephone companies.

The problem in applying this method to oil pipelines is a threefold one:

(1) The figure of 15½ to 16 percent for all corporate equities reflects the 25 percent debt ratio used. It cannot be applied without adjustment to corporations which have a different debt ratio.

(2) Most pipelines are part of integrated oil companies. The required return of funds committed to pipeline construction, ownership and operation cannot be correctly calculated directly from company data.

(3) The ratio of debt to equity for individual pipelines is not an economically meaningfully figure. The reason for this is that many pipelines clearly use debt funds to an extent that could not be raised to acquire pipeline assets but for the fact that the parent company guarantees the pipeline's debt. That is, on a stand-alone basis pipeline properties could not sustain as high a debt ratio as might appear on their "books."

Thus, available objective evidence on debt ratios used by pipelines may not reflect a pipeline's own debt capacity. Exxon, to take a hypothetical example, could easily borrow $50 million of long-term funds for a particular venture at 8½ percent by pledging its corporate credit—but clearly that $50 million should not be committed to *any* particular risky venture which offers a yield of 8½ percent on the basis of that borrowing cost. Theory and evidence both tell

us that the RRR on a venture should reflect the riskiness of that venture—and not the "cost" of the funds which are apparently used in their financing.

For the reasons given, the standard "weighted cost-of-capital" approach for setting the required rate on pipelines is likely to be a misleading one unless great care is exercised. In order correctly to estimate the RRR on pipelines by this method, two types of adjustments are required:

(1) It is necessary to estimate the maximum debt ratio which the pipeline can in fact use if it had to be financed on its own: Such a judgment requires evidence based on the expertise of an investment banker. In any case, it is not likely to be the same debt ratio figure we would get by looking solely at the "books" of the "average" pipeline.

(2) It is necessary to adjust equity rates required per unit of equity and debt rates per unit of debt in order to allow for the additional risks to both induced by a debt ratio which is higher than the ratio (*i.e.*, 25 percent) found in the portfolio of corporate assets (*i.e.*, the Standard & Poor's index of 500 corporations) from which our estimates of required rates were originally derived.

CONCLUSION

Of all the methods explained, the simplest and probably the most correct one, is that which is based on an estimate of the *relative* risk of pipelines as compared to Aaa corporate bonds. This approach would stay with the original 5 percentage point premium, over and above the prevailing Aaa bond rate, found in the 1940-41 decisions. At today's Aaa bond rate the best answer is that pipeline assets, as valued by the Commission, require a rate of return in the 13 to 13½ percent range for pipelines of minimum risks—with the rate scaled upward for above average riskiness.

Appendix A
Schedule 1

Corporate Bond Yields, 1937-41 and 1972-76
(Percent per annum)

	Aaa bonds
1937	3.26
38	3.19
39	3.01
40	2.84
41	2.77
Average 1937-41	3.01
1972	7.21
73	7.44
74	8.57
75	8.83
76	8.43
Average 1972-76	8.10

SOURCE:

Moody's Investor Services and Economic Reports of the President, 1970 and 1976.

Verified Statement of Ezra Solomon, Stanford University.

Appendix A
Schedule 2

Arithmetic average of realized yields on stocks and bonds, and the differential yield between the two:
Various periods 1902-1974
(Percent per annum)

	Stocks	Bonds	Differential (Risk premium)
1902-71 (Friend)	10.7	4.0	6.7
1926-71 (Friend)	11.6	3.8	7.8
1926-71 (Ibbotson)	12.0	3.8	8.2
1926-74 (Ibbotson)	10.9	3.7	7.2
1946-74 (Ibbotson)	10.8	2.4	8.4
Average:	11.2	3.5	7.7

SOURCE:

Friend and Blume, "The Demand for Risky Assets," *American Economic Review*, December 1975, pp. 900-22; Ibbotson and Sinquefield, "Stocks, Bonds, Bills and Inflation: Year by Year Historical Returns 1926-1974," *Journal of Business*, January 1976, pp. 11-47.

Verified Statement of Ezra Solomon, Stanford University.

Appendix B

Qualifications of Dr. Ezra Solomon

I am Dean Witter Professor of Finance, Graduate School of Business, Stanford University. I do both teaching and research in the field of financial management and managerial economics. I also engage in a wide range of consulting work.

I graduated with a First Class Honors Degree in Economics from the University of Rangoon, Burma, in 1940. I did graduate study at the University of Chicago from 1947 to 1950, where I received my degree of Doctor of Philosophy in finance. I was tutor in the Department of Economics, University of Rangoon in 1940 and 1941. I was a Lieutenant, Burma Division, Royal Navy, from 1942 to 1947.

I was on the faculty of the Graduate School of Business, University of Chicago, from 1948 to 1961, as Professor of Finance from 1957 to 1961. I have served as Visiting Professor at the Massachusetts Institute of Technology and at the University of North Carolina. I have lectured abroad on all six continents.

From 1970 to 1971 I was a member of the Presidential Commission on Financial Structure and Regulation. In June 1971 I was appointed to the President's Council of Economic Advisers in Washington, D.C., where I served until March 1973.

I was Editor of *The Journal of Business* from 1953 to 1957 and I have also served as a member of the Editorial Board of the *Journal of Finance, The Journal of Quantitative and Financial Analysis,* and the *Journal of Business Finance.* I am currently Consulting Editor in Finance, Prentice-Hall, Inc.

Verified Statement of Ezra Solomon, Stanford University.

I have testified extensively: among others, before the Canadian Royal Commission on Coastal Shipping Policy, the U.S. Senate Banking and Currency Committee, the U.S. Senate Commerce Committee and the Ways and Means Committee of the U.S. House of Representatives, as well as before the Federal Power Commission, the Federal Communications Commission and before state regulatory bodies. In 1967 I testified on behalf of the government in *United States* v. *Winegar,* on the rate of return required for investment in oil shale operations.

I have edited and written books and articles in the general field of economics and finance. Among the books are: *An Introduction to Financial Management* (Santa Monica, Goodyear, 1977); *The Anxious Economy* (Stanford, 1975); *Wall Street in Transition* (New York University Press, 1974); *Money and Banking,* 5th ed. (New York: Holt, Rinehart & Winston, Inc., 1968); *Metropolitan Chicago: An Economic Analysis* (Chicago: Free Press, 1959); (ed.) *The Management of Corporate Capital* (Chicago: Free Press, 1959); *The Theory of Financial Management* (New York: Columbia University Press, 1963); (ed.) Capital Budgeting (a special issue of the *Journal of Business,* University of Chicago, 1955).

I am a member of the American Economic Association and the American Finance Association. I have served as Consulting Economist to the American Institute of Certified Public Accountants, and as Consulting Economist and Director to Dodge & Cox (Investment Counsel) and am now serving as Consulting Economist to Wertheim & Co., Inc.

I have lectured with fair regularity at the annual Life Officer's Investment Seminars, the annual seminar for the National Federation of Financial Analysts, The Stanford

Verified Statement of Ezra Solomon, Stanford University.

Investment Management Seminar and the Institutional Investors Seminar.

I am a Director of Kaiser Aluminum and Chemical Corporation, Encyclopaedia Britannica Inc., S-G Securities, Inc. and United Financial Corporation of California, and have served on the Finance Committee and the Investment Committee of the Board of Trustees, Stanford University.

Affidavit of Albert H. Fitzgerald, Chairman of The Suspension and Fourth Section Board Attached to Appendix B: Reply of Interstate Commerce Commission in Opposition to Application for Injunction, July 11, 1977.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted in Printing]

ALBERT H. FITZGERALD, first being duly sworn states as follows:

1. My name is Albert H. Fitzgerald. I am employed by the Interstate Commerce Commission, Washington, D.C. 20423, where I serve as Chairman of the Suspension and Fourth Section Board, a position I have held since February 13, 1977. I was acting chairman of the Suspension Board from December 1975 to February 1977.

2. I have served with the Suspension Board in various capacities since November 1958. Prior to that I served for two years as a tariff examiner. Prior to coming to the Commission I served with various transportation companies in rate and tariff capacities since 1939. I attended Boston University from 1946-1948 and have studied at the Traffic Managers Institute of New York from 1948-1950.

In my capacity as Chairman of the Suspension Board I am thoroughly familiar with the Commission's practices relating to initial suspensions. I have no doubt that the Commission has, and has exercised, its power to suspend initial rates.

Affidavit of A. H. Fitzgerald, ICC.

Counsel handling this litigation asked me to provide examples of cases wherein the Commission's Suspension Board suspended initial rates. The attached pages indicate such suspensions. Pages 2 and 3 show suspensions of "initial and only" tariffs.

These examples were selected after only a limited search. I am convinced that numerous other examples could easily be found.

.....
ALBERT H. FITZGERALD, Chairman
Suspension and Fourth Section Board

.....
date

Subscribed and sworn to before me this 11th day of July, 1977.

.....
Notary Public

My commission expires .....

APPENDIX

The Suspension and Fourth Section Board does not maintain a separate list of the cases brought before it that involve "initial rates". Each case is considered on its own merits and whether or not the rates are initial rates is not a determining factor in the Board's conclusions to suspend or not to suspend.

The following list of instances in which initial rates were suspended was compiled after a two-hour random search through the Board's files—a longer search would produce many more cases in which initial rates were suspended.

Initial rates were suspended in:

I. & S. Docket No. M-26913, *Printed Matter, Milwaukee, Wis., To Western & Pacific Coast States;*

I. & S. Docket No. M-27737, *Roofing, Southwestern States To Arizona;*

I. & S. Docket No. M-28004, *Foodstuffs, Indiana and Michigan To the South And Southwest;*

I. & S. Docket No. M-28962, *Malt Beverages, Specialized Truck Service, Inc.;*

I. & S. Docket No. M-29163, *Foodstuffs, Henderson, N.C., To Mechanicsburg And Pittsburgh, Pa.;*

I. & S. Docket No. M-27192, *Beer & Empty Beer Containers, Between St. Louis, & Ft. Dodge;*

I. & S. Docket No. M-29359, *Confectionery, Derry Township, Pa., To Midwest States;*

I. & S. Docket No. M-27903, *Particleboard, Washington And Oregon To Minnesota;*

I. & S. Docket No. M-27956, *Wood & Plastic Products, Maine To Calif., Colo., Fla., & Wash.;*

I. & S. Docket No. M-28735, *Soybeans, Indiana To Pennsylvania And New Jersey;*

I. & S. Docket No. M-27966, *Feed and Feed Ingredients, Southwest To West;*

In the following instances, the suspensions caused the carriers to be without any rates:

I. & S. Docket No. M-26993, *Malt Beverages, Minnesota To Washington;*
initial rates for authority to be granted in MC-138363-TA suspended on 6/15/73 by vote of Board Members Babst, Holmgren, and Halvarson—Members Seeds and Fitzgerald not participating; suspended rates found unjust and unreasonable by Review Board 4, Members Brown, Fitzpatrick, and Shaw;
carrier's proposed Tariff MF-ICC 2 was suspended in its entirety;
the carrier had no other rates—its earlier tariff (MF-ICC 1) had also been suspended in its entirety (in I. & S. Docket No. M-26866);

I. & S. Docket No. M-26866, *Malt Beverages, Minnesota To Washington;* (see above)
initial rates for authority to be granted in MC-138363-TA suspended on 5/2/73 by vote of Board Members Seeds, Babst, Fitzgerald, Holmgren, and Halvarson;
carrier's proposed Tariff MF-ICC 1 was suspended in its entirety; the suspended tariff was later cancelled and a new

tariff (MF-ICC 2) was issued which was also suspended (in I. & S. Docket No. M-26993);
the carrier had no other rates;

I. & S. Docket No. M-25540, *Cleaning & Chemical Compounds, To Oregon & Washington;*
initial rates for authority to be granted in MC-136089-TA suspended on 2/14/72 by vote of Board Members Babst, Fitzgerald, and Holmgren—Members Hilton and Seeds not participating; the contract carrier's proposed Schedule MF-ICC 1 was suspended in its entirety;
carrier had no other rates;

I. & S. Docket No. M-28715, *Lime Rock, Duluth, Minn., To Drayton, N. Dak.;*
initial rates for authority to be granted in MC-140968-TA suspended on 8/25/75 by vote of Board Members Seeds, Fitzgerald, Babst, Holmgren, and Halvarson;
contract carrier's proposed Schedule MF-ICC 1 was suspended in its entirety;
carrier had no other rates;

I. & S. Docket No. M-27940, *Lead, Baton Rouge, La., To Points In Central States;*
initial rates for authority to be granted in MC-139727-TA suspended on 8/20/74 by vote of Board Members Fitzgerald, Babst, and Halvarson;
Item 100 in contract carrier's proposed Schedule MF-ICC 1 was suspended in its entirety;
carrier had no other rates;

I. & S. Docket No. M-28723, *Bricks, Endicott, Nebr., To Western States;*
initial rates for authority to be granted in MC-140225 (Sub 1-TA) were suspended on 8/28/75 by vote of Board Members Babst, Holmgren, and Halvarson—Member Fitzgerald voted not to suspend;
Item 100 to contract carrier's proposed schedule MF-ICC 1 was suspended in its entirety;
carrier had no other rates;

I. & S. Docket No. M-27380, *Malt Beverages & Empty Containers, Between Calif. & Oreg.;*
initial rates for authority to be granted in MC-138946-TA were suspended on 11/28/73 by vote of Board Members Seeds, Fitzgerald, Babst, Holmgren, and Halvarson;
Items 200 and 220 to proposed Schedule MF-ICC 1 were suspended in their entirety;
carrier had no other rates;

I. & S. Docket No. M-27682, *Bakery Goods, Phoenix, Ariz., to San Diego, Calif.;*
initial rates for authority to be granted in MF-139239-TA were suspended on 4/24/74 by vote of Board Members Seeds, Fitzgerald, Babst, Holmgren, and Halvarson;
Items 100 and 110 also Supplement 1 to contract carrier's proposed Schedule MF-ICC 1 were suspended in their entirety;
carrier had no other rates.

Motion of State of Alaska for Leave to Intervene, July 12, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted in Printing]

MOTION FOR LEAVE TO APPEAR AS PARTY PURSUANT TO 28 U.S.C. §§ 2323 AND 2348, AND RULE 15 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Comes now The State of Alaska, pursuant to 28 U.S.C. §§ 2323 and 2348 and Rule 15(d) of the Federal Rules of Appellate Procedure, and moves this court for leave to intervene and appear as a party in the above case involving review of an Order of the Interstate Commerce Commission. As grounds for granting this motion, movant respectfully shows the following:

1. The State of Alaska (hereafter referred to as Alaska) has participated as a party in interest to the proceedings before the Interstate Commerce Commission in its Investigation and Suspension Docket No. 9164, *Trans Alaska Pipeline System* (Rate Filings), which led to the order under review. Alaska, for the limited purpose of opposing Petitioner's attempt to obtain judicial order which would annul, set aside and enjoin the Commission's suspension Order, supports the Order issued by the Commission Decision served June 28, 1977. Alaska desires to participate in this proceeding as a party in support of the respondents.

2. The State of Alaska has a significant interest in the Commission's Order which is here under attack.

All of the Prudhoe Bay oil field lies entirely on State lands and constitutes—to a degree unique in the United States—a public asset, owned by the people of Alaska. Alaska is relying heavily on these oil resources to finance

current and future State needs. Consequently, the matter of the transportation costs to be borne by that crude oil and its effect on the State of Alaska is of vital interest to all Alaskans.

As a direct source of revenue to Alaska and its citizens, Alaska owns a one-eighth interest as a royalty share in the oil. In addition, Alaska has an oil production severance tax. Both the value of the royalty oil and the severance tax are tied to the value of the oil at the point of production, i.e. the wellhead value. The wellhead value is generally determined by the market price less the cost incurred in reaching the market, i.e. the transportation cost. Therefore, as the TAPS rates increase the value of Alaska's interest decreases.

In total, the State of Alaska has an approximate 20 percent interest in the wellhead value of all oil from the Prudhoe Bay Field. Based upon present estimates that the flow of oil through the line shortly after start-up will reach a level of 1.2 million barrels per day, the significance of each one cent change in the rate can be measured. One cent per barrel is the equivalent of $12,000 per day. On the assumption that each one cent change in the rate, whether an increase or a decrease, results in an equal change in the net wellhead value from a fixed selling price, each one cent change in the rate would, therefore, change the wellhead value of the oil by $12,000 per day at a production rate of 1.2 million barrels per day. Alaska's 20 percent interest in the wellhead value of the oil would, therefore, be the equivalent of $2,400 per day for each 1 cent change in the transportation charge.

On an annualized basis reflecting the transportation of 438 million barrels per year at a daily rate of 1.2 million barrels per day, Alaska's 20 percent interest in a one cent fluctuation charge in the transportation charge is the

equivalent of $876,000 per year. Clearly Alaska has a crucial interest in seeing that the rate charged, particularly the initial rate that goes into effect at the start-up of the line, is just and reasonable and does not reflect excessive returns to the individual pipelines and their oil company owners.

3. For the foregoing reasons, the State of Alaska is entitled under the provisions of 28 U.S.C. §§2323 and 2348 and Rule 15(d) of the Federal Rules of Appellate Procedure to intervene in this case.

WHEREFORE, the State of Alaska prays leave to intervene in this case in support of the respondent.

Respectfully submitted,

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Juneau, AK 99811

Dated: July 9, 1977

Excerpts from Memorandum of the State of Alaska in Opposition to Applications for Interlocutory Injuncion and Temporary Restraining Order, July 13, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted in Printing]

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The Commission's calculations assumed the allowable nature of *all* of the respondent pipelines' revenue requirements including:

(1) all claimed operating expenses regardless of amount and to whom paid (substantial payments are made to affiliated companies);

(2) all depreciation expenses, reflecting a recovery of the entire cost of construction over an abbreviated "economic life" of only 25 years which is substantially shorter than the anticipated service life of the pipeline;[1]

(3) all removal costs as estimated by the TAPS carriers, without modification, similarly recovered over a shortened life of only 25 years;[2]

(4) all annualized interest costs alleged by the TAPS carriers to be incurred in connection with the debt financing

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1. If any oil is found anywhere in Alaska, on shore or offshore, which would be tributary to the TAPS system, it would, of course, lengthen the economic life of TAPS. The U.S. Geological Survey estimates that there is a 95% probability that there is at least 9 billion more barrels of undiscovered but recoverable crude oil reserves in Alaska. Table 4, p. 28-29. Geological Estimates of Undiscovered Recoverable Oil and Gas Resources in the United States, Geological Survey Circular 725.

2. Removal costs were "estimated" by an unidentified consultant to Alyeska Pipeline Service Company, Alyeska being the TAPS carriers' agent, at $1.049 million in 1977 dollars. This cost was amortized over 25 years without increase for inflation or decrease for the earning capacity of the fund being generated. Order of June 28, 1977, page 5.

of the cost of construction (including the capitalization of interest charges during construction);[3]

(5) collection of inferred or imputed sums sufficient to pay both federal (48 percent) and state (9.4 percent) income taxes;[4]

(6) an allowance for a return on the equity for each of the pipelines in amounts ranging from 50.7 cents to 85.5 cents per barrel.[5]

• • •

3. Interest expenses will be adequately covered by the Commission's allowance of a ten percent (10%) return on "valuation". ICC "valuation" *exceeds* the original cost. Since, on the average, TAPS is at least 85 percent debt financed, coverage of the cost of capital on 85 percent of the investment is assured by the payment of interest costs.

4. There has been no showing by the TAPS carriers that such if any income taxes will actually have to be paid. An imputed tax allowance creates a cash flow available to the carrier at no cost until the time, somewhere in the indefinite future, when deferred taxes might have to be paid. See, *The Second National Natural Gas Rate Case,* U.S. App. D.C. , F.2d (No. 76-200 et al, June 16, 1977); *Memphis Light, Gas & Water Div.* v. *F.P.C.*, U.S. App. D.C. 500 F.2d 798 (1974). *People of the State of California* v. *FPC*, 506 F.2d 228, 232-33 (D.C. Cir. 1974).

5. The additional return of 72 cents per barrel to Mobil Alaska Pipeline Company, which has no equity according to all figures made available to the Commission, thereby results in an infinite percentage return to Mobil on its equity. The equity returns vary on a percentage basis from 13.30 percent for Amerada Hess up to 54.25 percent for ARCO.

Affidavit of J. D. Wessling, Comptroller, Treasurer and Secretary of ARCO Pipe Line Co. in Support of Application for Interlocutory Injunction, July 14, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted in Printing]

AFFIDAVIT

THE STATE OF KANSAS }
COUNTY OF MONTGOMERY }

J. D. WESSLING, being duly sworn, deposes and says:

I am Comptroller, Treasurer and Secretary and Manager, Administrative and Control of ARCO Pipe Line Company ("ARCO"), the Petitioner in this proceeding. I make this Affidavit in support of Application for Interlocutory Injunction restraining and suspending an order of the Interstate Commerce Commission which suspends for a period not to exceed seven months a tariff filed by ARCO with the Commission for the transportation of crude oil in the Trans Alaska Pipeline System ("TAPS").

ARCO owns a 21.00% undivided interest in TAPS. Schedule A to this affidavit shows projected operating results for ARCO for its share of TAPS over the seven-month period ending January 31, 1978, the approximate period of the suspension ordered by the I.C.C.

The figures appearing on this Schedule A are compiled from data furnished by ARCO to the I.C.C., on which the I.C.C. bases the calculations appearing in the appendices to its order now under review.

The figures on Schedule A reflect a build-up over the period covered in the amount of oil to be transported by ARCO. The I.C.C.'s calculations are based on operation for a full year at a rate which our figures show will not actually be reached until late in the suspension period. By the I.C.C.'s approach, ARCO would transport about 46.4

million barrels over the suspension period; actually, as Schedule A shows, we estimate ARCO will transport only 34.8 million barrels over that period, with correspondingly less revenue.

Schedule A shows operating results based on two different tariff rates. The figures in the left-hand column use the $6.04 initial rate tariff filed by ARCO, which the I.C.C. has suspended. The figures in the right-hand column use the $4.91 rate which the I.C.C. has said it would approve. As Schedule A shows, under the I.C.C. suggested rate ARCO's revenues would be, over the seven-month suspension period, $39.3 million less than under ARCO's suspended tariff.

In fact, as Schedule A shows, the $4.91 tariff will result in a deficiency in net income to ARCO of at least $26.1 million over the seven-month suspension period compared with the I.C.C.'s intended 10% return.

J. D. WESSLING
J. D. Wessling

[Sworn to on July 13, 1977.]

SCHEDULE A

ARCO PIPE LINE COMPANY

Operating Results for the Seven Months Ending January 31, 1978

Throughput (millions of barrels) (Note 1)	34.776	34.776
Tariff (dollars per barrel)	$ 6.04	$ 4.91
	(millions)	
Revenues	$ 210.1	$ 170.8
Operating Expenses:		
Operations and Maintenance	$ 32.3	$ 32.4
Provision for Dismantling Cost	4.4	4.4
Ad Valorem Taxes	13.7	13.7
Gross Receipts Taxes (¼ of 1%)	.5	.4
Provision for Depreciation	38.6	38.6
Interest	72.0	72.1
Total Operating Expenses	$ 161.5	$ 161.6
Income before Income Taxes	$ 48.6	$ 9.2
Provision for Income Taxes @ 52.32%	25.4	4.8
Net Income	$ 23.2	$ 4.4
Valuation per I.C.C.	$2,036.0	$2,036.0
10% (per I.C.C.) for 184 days	$ 102.6	$ 102.6
Less Interest	72.0	72.1
Net Income Allowable per I.C.C.	30.6	30.5
Deficiency (net income less than allowable)	7.4	26.1
Rate of Return on Valuation (Note 2)	9.3%	7.5%

NOTES:

1. Throughput estimates are ARCO's 21% of .6 million barrels per day ($\overline{M}$BD) from August 1, to October 31, 1977 and 1.2 $\overline{M}$BD from November 1, 1977 to January 31, 1978. The only change from previous estimates is to add August, 1977, at .6 $\overline{M}$BD. It is now estimated that volumes will not exceed .8 $\overline{M}$BD during the suspension period because of recent damage to Pump Station No. 8.

2. Interest plus net income, annualized, divided by Valuation per I.C.C.

Motion of Respondent United States of America For Consolidation and to Dismiss, (all cases) July 14, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted In Printing]

The United States of America moves this Court to consolidate the above-captioned cases with case No. 77-2392, *Mobil Alaska Pipeline Company* v. *United States et al.*

The United States further moves this Court to dismiss the petitions for review in Nos. 77-2412, 77-2421, and 77-2437.

1. In support of its Motion to Consolidate the United States submits that each of the aforesaid petitions seeks judicial review of a June 28, 1977 Order of the Interstate Commerce Commission which suspended proposed Trans Alaska Pipeline System (TAPS) tariffs filed by the respective petitioners. Consolidation of these actions would conserve the time of the Court and facilitate review of the subject order. The Clerk of this Court is empowered under Local Rule 10(a)(9) to grant an unopposed Motion for Consolidation.

2. In support of its Motion to Dismiss the petitions in Nos. 77-2412, 77-2421, and 77-2437, the United States refers this Court to its July 12, 1977 Motion to Dismiss the petition in No. 77-2392 and memorandum in support thereof, *Mobil Alaska Pipeline Company* v. *United States,* and hereby incorporates by reference the points and arguments made therein.

3. The United States submits that the petitions in Nos. 77-2412, 77-2421, and 77-2437 raise no significant issues not disposed of in its Motion to Dismiss and memorandum in support thereof in No. 77-2392. This Court may grant the relief requested herein on the papers thus far submitted.

Motion of United States to Dismiss.

4. The United States, however, is preparing an additional memorandum addressed to those issues raised in Nos. 77-2412, 77-2421, and 77-2437 not raised by petitioner Mobil Alaska Pipeline Company in No. 77-2392 which will be filed with this Court by Friday, July 15, 1977.

The United States, therefore, prays that the Court enter an order consolidating the above-captioned cases with case No. 77-2392, dismissing the petitions of BP Pipelines Inc., Exxon Pipeline Company, and Arco Pipe Line Company for review of an order of the Interstate Commerce Commission and granting such other relief as the Court deems just and proper.

Respectfully submitted,
JOHN H. SHENEFIELD,
Acting Assistant Attorney General,

DONALD L. FLEXNER,
Acting Deputy Assistant Attorney General,

BARRY GROSSMAN,
JOHN J. POWERS III,
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Washington, D.C. 20530

[Certificate of Service Omitted in Printing]

Excerpts from Memorandum of Arctic Slope Regional Corporation In Opposition To Application of Mobil Alaska Pipeline Co. for Interlocutory Judgment and Temporary Restraining Order, July 14, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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II.

BACKGROUND

The interest of the Arctic Slope Regional Corporation ("ASRC") and Alaska Natives in this proceeding derives from the unique relationship between Native land claims and oil development in Alaska. The Commission's suspension of Mobil Alaska's proposed TAPS' tariff cannot be reviewed without an appreciation of this relationship and the impact of TAPS' tariffs generally on Native interests in Alaska.

A. *Native Claims, Alaska Oil Development and the Trans-Alaska Pipeline System*

Prior to the enactment of the Alaska Native Claims Settlement Act ("ANCSA") on December 18, 1971, the Inupiat Eskimos held claims of unextinguished aboriginal title to the entire Arctic Slope of the State of Alaska, an area which encompasses Prudhoe Bay and much of the land over which TAPS was constructed. *See* Federal Field Committee for Development Planning in Alaska, *Alaska Natives and the Land,* 459, Figure V-19 (1968); Protests to Land Selections by State of Alaska, Protest #F-035257; 43 U.S.C. § 1601(a). Other Native people of Alaska (Eskimos, Aleuts, and Indians) had similar and substantial claims to other areas of the State. *Alaska Natives and the Land,* ch. 5.

The Supreme Court has repeatedly declared that aboriginal title gives exclusive possessory rights to Indians which

can be extinguished only by act of Congress. *E.g., Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661 (1974); *United States* v. *Santa Fe Pacific R.R. Co.,* 314 U.S. 339 (1941). Between 1867, when Alaska was purchased from Russia, and 1971, Native rights of use and occupancy in that territory were preserved and protected by regulations of the Department of the Interior, *e.g.,* 43 C.F.R. § 2091, 6-3, and by congressional acts. Act of May 17, 1884, ch. 53, § 8, 23 Stat. 24, 26; Act of March 3, 1891, ch. 561, § 14, 26 Stat. 1096, 1100; Act of June 6, 1900, ch. 786, § 27, 31 Stat. 321, 330; Act of July 7, 1958, Pub. L. No. 85-508, § 4, 72 Stat. 339 (Alaska Statehood Act). Because Native land claims in Alaska encompassed 90% of the State, those claims were, before their extinguishment, a substantial obstacle to oil development in Alaska and to TAPS' construction.

In the mid-1960's pressures for oil development of Native lands in the Arctic Slope began to mount. By all means available to them, Arctic Slope Eskimos and other Alaska Natives vigorously protested actions by the State of Alaska and others which would have deprived them of their aboriginal lands. *E.g., Alaska Natives and the Land,* Figure V-19. In response to these protests and the United States' fiduciary duty to Native Americans, the Secretary of the Interior imposed a "land freeze" in 1966, halting all transfers of public lands in Alaska pending resolutions of Native land claims. P.L.O. No. 4582, 34 Fed. Reg. 1025 (1969); S. Rep. No. 92-405, 92d Cong., 1st Sess. 97 (1971) (discussing Native protests and resulting informal freeze orders). The land freeze, upheld in *State of Alaska* v. *Udall,* 420 F.2d 938 (9th Cir. 1969), and the discovery of oil on the Arctic Slope greatly increased pressure on Congress to resolve the competing claims of Alaska Natives and the State of Alaska so that oil development could proceed.

On December 18, 1971, Congress enacted the Alaska Native Claims Settlements Act to eliminate Native land rights as an obstacle to oil development and pipeline construction. Section 4 of the Act extinguished all aboriginal land claims in Alaska, including the Arctic Slope Eskimos' claim to Prudhoe Bay. 43 U.S.C. § 1603. ANCSA also transferred to the State of Alaska substantial portions of Prudhoe Bay that had been selected by the State under color of the Statehood Act. 43 U.S.C. § 1613(g).

As compensation for that extinguishment, ANCSA granted Alaska Natives fee title to approximately 40 million acres of land. 43 U.S.C. § 1611, 1613. All future revenues derived from that land will be the property of the Alaska Native people. 43 U.S.C. § 1606.

ANCSA also provided for cash compensation of $962,500,000 to be paid over a period of years. $462,500,000 of that settlement will be paid by the United States from appropriated funds. 43 U.S.C. § 1605. The remainder will be paid on revenues derived from a 2% royalty on the wellhead value of all crude oil production in Alaska under state or federal leases. 43 U.S.C. § 1605, 1608.

Thus, from a pre-1971 position of opposition, Alaska Natives found themselves dependent on Alaska oil and gas development after ANCSA. Substantial areas of land, particularly those received by ASRC, given to the Natives in exchange for extinguishment of aboriginal title have little value except for oil and gas development. More than half of the funds to be paid to Alaska Natives must be derived from royalties on oil production.

Native interests are also closely tied to TAPS itself, which allows the marketing of oil on which ANCSA's settlement turns. Prior to the passage of ANCSA, eight oil companies that had state leases on the 10 billion barrel

reserves at Prudhoe Bay, joined together to form a consortium to construct and operate a pipeline to transport their oil to market. After passage of ANCSA, those companies formed the Alyeska Pipeline Service Company. After numerous delays and significant litigation, Congress finally acted in 1974 to authorize directly construction of TAPS and to assure full federal cooperation. Trans-Alaska Oil Pipeline Authorization Act, 67 Stat. 557, 43 U.S.C. §§ 1551-55. One of the reasons advanced by the pipeline companies for passage of that Act was that its early completion would benefit Alaska Natives.

B. *Impact of TAPS' Tariffs on ASRC and Alaska Natives.*

ASRC and the twelve other regional corporations created by ANCSA have specific responsibilities for the administration of ANCSA's land claims settlement period. These responsibilities include investment and distribution of settlement funds, selection of land granted under the Act, management of those lands, assisting village corporations, and general responsibility for economic development of major Native regions of Alaska. *See generally* 43 U.S.C. § 1606.

ASRC, for the benefit of its nearly 4,000 Inupiat Eskimo shareholders, was granted selection rights by ANCSA to approximately 5.5 million acres of surface and subsurface lands on the Arctic Slope in exchange for extinguishment of its aboriginal claims to 56 million acres. Since 1972 ASRC has selected its entitlement and has received interim conveyances to approximately 4.5 million acres from the United States.

These lands, most of which are far from Native Villages, are virtually the only economic asset of the Inupiat Eski-

mos. Thus, whether one of America's last settlements with this country's original inhabitants will have any meaning for the Inupiat Eskimos will turn directly on the oil and gas revenues which can be derived from these lands.

The impact of TAPS' tariffs on the economic interest of ASRC and its Native shareholders is direct and immediate. The value of ASRC's lands and the amount of revenue which can be derived from oil development on those lands is tied directly to the wellhead price of crude oil on the Arctic Slope. Under present economic conditions, that wellhead price is inversely related to the tariff rate charged on TAPS. A TAPS tariff of $6.00 instead of $3.00 means that the wellhead price of crude oil on the Arctic Slope will be $3.00 lower. Excessive TAPS tariffs will cause substantial harm to ASRC and the Inupiat Eskimos in four specific ways:

1. Because the value of ASRC's Settlement Act lands turns almost exclusively on the amount of oil and gas revenues which can be generated from them, high TAPS tariffs, which drive down the amount of revenue which can be generated from those lands, directly reduce the value of those lands for lease or sale.

2. If, as is likely, oil reserves suitable for commercial development are found on ASRC's lands adjacent to TAPS, crude oil will be tendered for shipment on TAPS by ASRC or its lessees. High TAPS tariffs will directly reduce the revenues derived from these shipments.

3. On behalf of the Inupiat Eskimos, ASRC will receive a share of the 2% royalty imposed by ANCSA on all crude oil production in Alaska occurring

under state or federal leases. The higher the wellhead value of oil produced under such leases, the sooner the Alaska Native Fund will receive and distribute the $500 million granted by ANCSA. Any delay in the receipt of these royalty payments will substantially reduce the value of those payments to ASRC and all Alaska Natives.

4. Under § 7(i) of ANCSA, ASRC is a beneficiary of a proportionate share of 70% of all revenues from crude oil production occurring on lands owned by the other 11 regional Native corporations. To the extent that such oil is shipped on TAPS, or that TAPS tariffs fix other pipeline tariffs in Alaska, high TAPS tariffs will drive down the value of these revenues to ASRC and all Alaska Natives.

In each of these instances, the benefits granted to ASRC by the United States in compensation for the extinguishment of its aboriginal title will be diminished to the extent that crude oil owned by ASRC, or crude oil owned by others to which ASRC has a revenue entitlement, is shipped through TAPS at the proposed rates. For a summary of the effect of TAPS tariffs on the wellhead price of Arctic Slope crude oil and the pay-out period for the Alaska Native Fund, see Exhibit A attached hereto.

For these reasons, the present controversy is more than a simple argument between shippers and carriers over shipping rates. ASRC believes that the Commission's action challenged herein was designed in part to insure that the value of ANCSA's settlement to Alaska Natives is not siphoned off in the form of pipeline profits from excessive TAPS tariffs.

III.

An Overview of this Controversy

At least four general factors are important to an understanding of the context in which Mobil Alaska's motion arises.

First, petitioner Mobil Alaska and the other TAPS common carriers are vertically integrated with the producing companies which will ship oil through the pipeline. These parent companies also own a share of production from Arctic Slope reserves that is within two or three percentage points of their ownership shares in TAPS. BP and Sohio, whose interests in this area are controlled by the terms of a merger agreement, together own 49.18% of the pipeline and 52.2% of the Prudhoe Bay field. Exxon owns 20% of the pipeline and 20.3% of the field. Arco owns 21% of the pipeline and 20.3% of the field. Phillips owns 1.66% of the pipeline and 2% of the field. Mobil owns 5% of the pipeline and 2.17% of the field. Only 2.1% of the field is not owned by TAPS carriers.

For this reason, Mobil's claim that the Commission's decision "awarded damages" or allows respondents to "reap the spoils," Mobil Mem. at 1, 2, is irrelevant rhetoric. Since the delivered market price of Arctic Slope oil will not be affected by transportation costs, any tariff reductions will increase the wellhead price paid to the producer oil companies. Consequently, any reduction in revenues from lower TAPS' tariffs will be substantially offset by additional profits attributable to increased wellhead prices.

Second, the oil companies have strong economic incentives to maintain high TAPS' tariffs and low wellhead prices. With the demise of the oil depletion allowance, ANCSA's provisions for royalty payments, and the imposition of severance taxes on the wellhead price of oil by the State of Alaska, TAPS owners have strong incentives to channel profits through pipeline operations and to maintain production prices as low as possible.

Third, Mobil Alaska's complaint that the Commission conducted "an informal proceedings concluded in a matter of days in which no factual record was developed," Mobil Mem. at 1, is entirely the consequence of a deliberate choice made by petitioner and the other TAPS carriers. Mobil Alaska, for example, issued its tariff on June 10, 1977, to be effective on June 20, a bare ten days' notice to the Commission and other parties involved. Because these tariffs involve a project which has been planned for more than eight years and has been three years in actual construction, the decision to impose tariffs on such short notice can only be deliberate. Mobil Alaska cannot now be heard to complain of the consequences.

Mobil Alaska's complaint regarding the factual record before the Commission is similarly without merit. All of the data on which a proper TAPS tariff can be based is in the hands of petitioners and the other TAPS carriers. If they have failed to place this information before the Commission, they are estopped from objecting. Moreover, as the Commission's order demonstrates, the decision appealed from was, for the most part, based on figures supplied by the carriers themselves. Interstate Commerce Commission, Investigation and Suspension Docket No. 9164, Order at 5 [hereinafter "Order"].

Fourth, and perhaps most importantly, the Commission's action challenged here allows Mobil Alaska and the other TAPS carriers to operate the pipeline at a very handsome rate of return. Using data supplied by the TAPS carriers themselves, the Commission found that the originally filed

rates would produce returns on equity ranging from 31% to 96%. Order at 6.[1]

Interim tariffs which the Commission has indicated it would permit produce returns on equity, *after taxes*,[2] of 16.8% to 20.6%. Since Mobil Alaska indicates that it has invested no equity whatsoever in its share of TAPS, any rate of return it receives will be infinite.

These four points alone underscore the weakness of Mobil Alaska's claim that the court's equity powers should be exercised on its behalf.

IV.

Mobil Alaska Meets None of the Standards for Preliminary Injunctive Relief

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B. *Mobil Alaska Will Suffer No Irreparable Harm if the Requested Injunction Is Denied.*

As Mobil Alaska acknowledges at the outset, the burden of proof is on it to demonstrate irreparable harm which will occur unless injunctive relief is granted. Mobil Mem. at 11. As Mobil Alaska also acknowledges, the practical effect of the Commission's order gives it two alternate courses of action: (1) to refile a proposed tariff of $4.84 per barrel and to operate as a common carrier at that rate for the next

1. ASRC believes that more accurate data and use of lawful rate calculation methodologies would show that the originally filed TAPS tariffs would produce rates of return substantially in excess of those figures. For a review of computations of TAPS tariffs based on modified carrier data and methodologies, see Exhibit B hereto which shows that TAPS tariffs as low as $3.69 to $2.24 (under varying assumptions) would produce equity returns of at least 8%.

2. At an assumed tax rate of 52.9%.

seven months, or (2) to suspend common carrier operation until the Commission completes its determination as to the lawfulness of Mobil Alaska; originally filed rate or until January 29, 1978, whichever should come first. Verified Petition of Mobil Alaska at 23-24. Mobil Alaska has not even attempted to show that it would suffer irreparable harm if it chose either of these alternatives.

1. *Mobil Alaska Has Made No Showing That It Will Suffer Irreparable Harm From Seven Months of TAPS Operations at a $4.84 Tariff Rate.*

To show harm or harm resulting from the Commission's suspension order, Mobil Alaska must demonstrate that the final tariff it will be allowed to charge for transportation of crude oil on TAPS will exceed $4.84 per barrel. If the Commission sets the final TAPS tariff at $4.84 or any lower figure, petitioner will have suffered no harm, let alone irreparable harm, from the Commission's suspension order. Mobil Alaska, however, has offered no such evidence.

Mobil Alaska argues only that it will suffer a gross revenue loss. However, if the Commission sets the final tariff at $4.84 or any lower figure, that gross revenue would have been the result of an unlawful tariff and Mobil Alaska would be compelled to refund the entire sum to shippers as overcharges. Absent proof that the final TAPS tariff will exceed $4.84 and hence that Mobil Alaska will not have to refund the entire sum alleged as a revenue loss, Mobil Alaska has not shown that it will suffer any economic loss if an injunction is denied.

Even if Mobil Alaska had attempted to show that the final "just and reasonable" tariff rate for TAPS would exceed $4.84 per barrel, the effort would not be convincing. By

making simple adjustments to the data supplied by the TAPS carriers themselves, and basically by reducing equity return rates from a range of 31% to 95% (based on the tariffs proposed by the TAPS carriers) to a composite return on equity *after taxes* of 23%, the Commission arrived at the $4.84 figure as a suggested tariff for Mobil to Alaska. This computation totally ignored the evidence and argument supplied by ASRC and other protestants before the Commission that the tariffs should be substantially lower than $4.84 because even that figure reflected improper cost data, improper tax and depreciation methodology and improper rate computation methodologies. As the following brief discussion demonstrates, there is a virtual certainty that the final TAPS tariff to be set by the Commission will be *significantly lower* than $4.84.

(a) *Mobil Alaska's Proposed TAPS Tariff Improperly Deducted Interest Expense in Calculating Rate of Return on the Valuation of the TAPS System.*

Appendix 3 to the Commission's order sets forth the effect of the $6.31 per barrel tariff rate originally filed by Mobil. At that rate Mobil would achieve a 13.8% return after taxes on its total investment. Because Mobil's tariff rate is based on a computation which allowed it to treat the cost of its borrowed funds as an operating cost, and because no equity capital is invested in Mobil Alaska, the 13.8% return on total investment is a staggering gift. The rate of return based on equity is infinite.

ASRC believes that deduction of interest which is paid upon borrowed funds as an operating cost, and inclusion of borrowed funds in the base upon which a tariff rate is calculated gives carriers a classic "double-dip" at the expense of shippers and Alaska Natives and plainly results in excessive and unreasonable rate tariffs. The Commission properly disallowed the first dip. Accordingly, there is no substantial basis to believe that the final TAPS' tariff for Mobil Alaska will be substantially higher than $4.84.

(b) *Mobil Alaska's Proposed TAPS Tariff Is Based Upon an Unreasonably High Capital Base.*

In 1969 TAPS proponents stated that the project would cost $900 million. Speech by E. L. Patton, Chairman, Alyeska Pipeline Service Company, to Town Hall of California (May 17, 1977). In 1971, subsequent to enactment of the National Environmental Policy Act (NEPA), Mr. Patton estimated that TAPS would cost close to $2.5 billion. Note, 81 Yale L.J. 1592, 1629 n.172 (1972). Mobil now states that TAPS costs will exceed $9 billion. Verified Petition of Mobil Alaska at 6. Thus, between 1969 and 1977, TAPS costs increased by more than 900%. Even between 1971—when hard and reliable construction estimates were presumably made—and 1977, the costs increased by 260%.

This increase, in part, is the result of more than eight years' inflation and the cost of providing environmental safeguards; however, Touche, Ross and the General Accounting Office, and now the Commission, are currently investigating the extent to which a portion of this increase may be attributable to mismanagement and waste. If such mismanagement and waste is substantiated, these costs cannot be passed on to TAPS shippers.

Also, to the extent that interest rates on TAPS debt exceed a reasonable amount and are not comparable to rates paid by affiliates of TAPS carriers, this excess may not be passed on to TAPS shippers. If any significant reduction in capital cost is made for either of these items, the

adjusted figures would generate a tariff rate substantially lower than the $4.84 interim rate.

(c) *Mobil Alaska's Interim Tariff Is Improperly Based Upon a Twenty-five Year Amortization and Depreciation Period.*

The TAPS carriers have estimated the pipeline's useful life to be 25 years. But, the useful life of other pipelines owned by TAPS carriers range between 31 and 42 years, and previous estimates established TAPS' useful life at 35 years. If TAPS' useful life were 35 years, yearly amortization of pipeline removal expenses and annual depreciation charges would be substantially lower. The Commission has promised that this issue will receive "substantial attention in its formal investigation." Order at 5. Since the Commission's suggested $4.84 rate is based on the carrier's 25-year figure, any increase in the useful life of TAPS would reduce the rate still further.

(d) *Mobil Alaska's Proposed TAPS Tariff Is Projected Upon an Unrealistically Low Throughput of Oil.*

Mobil Alaska's net revenue projections are based upon a throughput of 1.2 million barrels of oil per day. The projection varies dramatically from earlier projections of 2 million barrels per day. *E.g.*, Note, 81 Yale L.J. 1592, 1627 n.156. Since operating income increases strongly with increased throughput, it can be assumed that the final tariff will be significantly reduced by the use of a more realistic higher throughput which ASRC understands can be expected after 1979 or 1980.

(e) *Mobil Alaska's Proposed TAPS Tariff Is Unrealistically Based Upon an Assumed Tax Rate of 52.9%.*

ASRC doubts that Mobil Alaska will pay any federal income taxes in 1977 or for a long time, if ever, thereafter. Similarly nothing in its corporate parent's tax-paying history in any way supports Mobil Alaska's projection of a 52.9% tax rate for purposes of computing its return on total investment or equity. Use of an actual rather than an "assumed" tax rate in TAPS tariff computations would further reduce the $4.84 interim rate.

(f) *Conclusion.*

As the Commission's order indicates, there are substantial questions concerning numerous aspects of the data and methodologies used by the TAPS carriers to justify their proposed tariffs. The Commission has promised a full investigation and review to analyze each of these issues. Since its $4.84 tariff was reached primarily by reducing the rate of return to the carriers from their TAPS operations without challenging their data or methodology, the likelihood that the ultimate TAPS tariff will be lower than $4.84 for Mobil Alaska verges on certainty. Thus, although petitioner Mobil Alaska has not even attempted to show that the Commission's order will cause it harm through loss of lawful revenues, such a showing could not have been made.

2. *Mobil Alaska Has Not Shown That Suspension of Pipeline Operations Would Cause It Irreparable Harm.*

The eight TAPS carriers may also respond to the Commission's order by suspending pipeline operations until such time as the Commission completes its determination

as to the lawfulness of their originally filed rates or until January 29, 1978, whichever should occur first.[4] Mobil Alaska alleges that suspension of operations would subject it to a revenue loss of "up to $88,000 per day for each day of this period." Verified Petition of Mobil Alaska at 23. Net revenue loss would obviously be lower.

Assuming *arguendo* that petitioner will suffer some substantial loss of *net* revenue, Mobil Alaska has made no showing that if commencement of pipeline operations is delayed, it will not recover the expenses of such delay from future tariff charges.

Suspending pipeline carrier operations simply postpones the time at which Mobil Alaska will begin to accumulate net revenues. The loss from such delay can be precisely calculated as the interest Mobil Alaska could have earned on such net revenues as they accumulated. Just as construction interest on borrowed funds is included in Mobil Alaska's rate base, so, too, presumably, would Mobil Alaska claim lost interest on net revenues which could not be collected because of compliance with the Commission's suspension order.

Thus, before petitioner Mobil Alaska can prove irreparable harm, under this alternative it must show (1) that if the injunction is not entered, the pipeline will not be operated, and (2) that interest on lost net revenues will not be provided for in its final TAPS' tariff.[5]

Accordingly, whether Mobil Alaska commences common carrier operations at the $4.84 tariff level suggested by the Commission, or whether common carrier operations are postponed until Mobil Alaska's $6.34 rate becomes effective, Mobil Alaska has not shown, and cannot show, that it will suffer irreparable harm of any kind.

4. Of course, the probability that the TAPS carriers would simply refuse to operate the pipeline for the next seven months is virtually zero.

5. Even under this alternative, proof that the final tariff will exceed $4.84 is required.

C. *ASRC Will Suffer Irreparable Harm if Injunctive Relief Is Granted.*

If injunctive relief is granted, Mobil Alaska will be allowed to commence pipeline operations at a tariff rate of $6.34 per barrel. As demonstrated above, and as found by the Commission, the likelihood that this rate is excessive and unlawful is virtual certainty. Any unlawful revenue retained even temporarily by TAPS carriers deters Alaska Natives from gaining their rightful place in Alaska's economy. Moreover, revenues lost to ASRC and to other Alaska Natives from the reduced wellhead price of oil on which their 2% royalty is based may never be fully recovered. There is no assurance that the producing affiliates of the pipeline companies would apply to the pipeline companies for any refunds that might be determined by the Commission since such an intercompany transfer would be subject to royalty payments and state severance taxes. Furthermore, the TAPS carriers do not concede the applicability of a refund condition to reconstruct the proper payments, adjusted for normal interest, once a proper tariff has been determined by the Commission.[6] Thus, although ASRC and Alaska Natives may ultimately recover the full amount to which they are entitled from the Alaska Native Fund, the interest lost by the delay in receiving that amount will not likely be recovered from Mobil Alaska and the other TAPS carriers.

6. *See, e.g.,* Petition of Exxon Pipeline Company For Reconsideration, ICC Investigation and Suspension Docket No. 9164 on July 8, 1977 at 3; Oral Argument of Robert E. Jordan, ARCO Pipeline Company, In the Matter of Trans-Alaska Pipelines System at 165-166 (June 27, 1977).

Further irreparable harm to the Inupiat Eskimos and the other Alaska Native people will result from a loss of revenue to the State of Alaska. Passage of ANCSA and termination of many federal responsibilities to Natives in Alaska has thrust increasing burdens onto the State which its oil revenues must pay for. Most Native villages desperately lack adequate schools, utilities, public health services, vocational training facilities, year-round recreational opportunities and many other public facilities and services that are taken for granted in other parts of the country. Any significant revenue loss for any substantial number of months would dramatically impact the State's efforts to fund schools and other programs in Native areas.

D. *Injunctive Relief Would Be Adverse to the Public Interest.*

Excessive TAPS tariffs will have a strong anti-competitive effect on all oil development on the Arctic Slope. Under present economic circumstances, the wellhead value of Alaska oil varies inversely with the TAPS' tariffs. Excessive tariffs will effectively limit access to and control of Arctic Slope development to those producers who can absorb the high tariffs, *i.e.,* Mobil Alaska and the other TAPS owners, who can recapture excessive shipping costs in the form of higher returns on their TAPS' investment. Other potential producers will be deterred from paticipating if they have to share up to $3.00 of the wellhead value of their oil with the TAPS carriers. The possibility of "reparations," "refunds," or "damages" will be unlikely to affect decisions by other companies not to explore and develop.

High tariff rates can be used as a classic tool by the TAPS' owners to prevent any competition from develop-

ing for the production and delivery of Arctic Slope crude oil. The strong public interest against such action would be affected most adversely by a decision of this court allowing Mobil Alaska to operate at a tariff rate which is plainly excessive and unlawful.

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Decision of Court of Appeals.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 77-2392, 77-2412, 77-2421 and 77-2437

MOBIL ALASKA PIPELINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION, et al.,
Respondents,

and

SOHIO PIPE LINE COMPANY, AMERADA HESS PIPELINE
CORPORATION, UNION ALASKA PIPELINE COMPANY,
Intervening Petitioners,

STATE OF ALASKA AND
ARCTIC SLOPE REGIONAL CORPORATION,
Intervening Respondents.

BP PIPELINES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION,
Respondents.

EXXON PIPELINE COMPANY,
Petitioner,

UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION,
Respondents,

and

UNION ALASKA PIPELINE COMPANY,
Intervening Petitioner.

Decision of Court of Appeals.

ARCO PIPE LINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION, et al.,
Respondents,

STATE OF ALASKA,
Intervening Respondent.

July 29, 1977

On Petitions to Review an Order of the Interstate Commerce Commission.

Before BROWN, Chief Judge, GODBOLD and RONEY, Circuit Judges.

PER CURIAM:

Four petitions seeking injunctive relief and review of a June 28, 1977 Order of the Interstate Commerce Commission are before us, together with the United States' motion to dismiss.[1] For reasons discussed below, we grant the government's motion.

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[1] No. 77-2392, Petition of Mobil Alaska Pipeline Company (Mobil) to Annul, Set Aside and Enjoin Enforcement of an Order of the Interstate Commerce Commission and Applications and Motions for Temporary Restraining Order and Interlocutory Injunction. The respondents in this case were the United States, the Interstate Commerce Commission (ICC or Commission) and the latter's individual Commissioners. The State of Alaska moved to appear as a party. The Arctic Slope Regional Corporation moved to intervene. Both opposed Mobil's petition. Sohio Pipe Line Company moved to appear as a party in support of Mobil's petition, as did Amerada Hess Pipeline Corporation. Union Alaska Pipeline Company moved to appear as a party.

No. 77-2412, Petition to Enjoin, Set Aside, Suspend and Review Order of the Interstate Commerce Commission and Motion to Stay, Restrain and Suspend Order of the Interstate Commerce Commis-

This controversy arose on the eve of the flow of crude oil through the Trans Alaska Pipeline System (TAPS)[2] which stretches from oil fields in Alaska's North Slope at Prudhoe Bay to Valdez, Alaska, some 800 miles distant. The pipeline was constructed by the Alyeska Pipeline Service Corporation, an agent for its eight owners.[3]

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sion filed by BP Pipelines, Inc. (BP), naming the United States and the ICC as respondents.

No. 77-2437, Petition for Review and Application for Interlocutory Injunction filed by Arco Pipe Line Company (Arco). The United States, the ICC and its individual Commissioners were named as respondents. Alaska also sought leave to appear as a party in opposition to Arco's petition.

No. 77-2421, Petition for Review and Motion for Expedited Consideration or, in the Alternative, for a Stay Pending Review, filed by Exxon Pipeline Company (Exxon), naming the ICC and the United States as respondents. Union Alaska Pipeline Company moved to appear as a party.

The United States moved for consolidation and to dismiss. The motion for consolidation was granted from the Bench during oral argument on July 19, 1977. The court hereby grants all motions to intervene.

[2] In 1968 massive reservoirs of oil were discovered at Prudhoe Bay. Plans to construct the pipeline were announced in 1970. From its beginning the pipeline has been grist for judicial mills. *See, e.g., Wilderness Society* v. *Morton*, 156 U.S.App.D.C. 121, 479 F.2d 842 (1975) (en banc); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), *rev'g* 161 U.S.App.D.C. 446, 495 F.2d 1026 (1974). Indeed, it literally took an act of Congress to prevent further environmental litigation. Trans-Alaska Pipeline Authorization Act, 43 U.S.C.A. § 1652(d). Construction was thus delayed until 1974 and took three years

Oil began to enter the pipeline on June 20, 1977. An explosion and fire at pump station No. 8 on July 8, 1977, resulted in a temporary shutdown. The parties have informed the court that the first oil is expected to reach Valdez around July 26, 1977.

[3] Each of the following companies owns an undivided interest in TAPS:

[Footnote continued on page 8a]

Between May 27, 1977 and June 15, 1977, seven TAPS owners filed the tariffs[4] which are at issue here,[5] having effective dates ranging from June 20 to July 1, 1977. Protests were filed by the Department of Justice, the State of Alaska,[6] the Arctic Slope Regional Corporation,[7]

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[3] [Continued]

Company	Percentage Ownership
Mobil Alaska Pipeline Co.	5.00%
Sohio Pipe Line Co.	33.34%
Arco Pipe Line Co.	21.00%
Exxon Pipeline Co.	20.00%
BP Pipelines Inc.	15.84%
Phillips Alaska Pipeline Corp.	1.66%
Union Alaska Pipeline Co.	1.66%
Amerada Hess Pipeline Corp.	1.50%

These companies are subject to ICC regulation by virtue of the Interstate Commerce Act, 49 U.S.C.A. § 1(1)(b), which covers common carriers engaged in the transportation of oil by pipeline.

[4] Tariffs must be filed with the ICC pursuant to 49 U.S.C.A. § 6(1).

[5] Because Phillips, the eighth owner, filed its tariff on June 20, 1977 with an effective date of July 20, the time for filing protests had not expired by June 28, the date of the ICC's order. Phillips' tariff was thus not covered by the Order and is not before this Court.

[6] Alaska owns a one-eighth royalty interest in the oil from the Prudhoe Bay fields. In addition, Alaska has an oil production severance tax. Both the value of the royalty oil and the severance tax are tied to the value of the oil at the point of production, *i.e.*, the wellhead value. Alaska contends that the wellhead value is generally determined by the market price *less* the transportation costs. Therefore, as the TAPS carrier rates increase, the value of Alaska's interest decreases.

[7] Prior to the enactment of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C.A. §§ 1601-1627, the Inupiat Eskimos held claims of unextinguished aboriginal title to the entire Arctic Slope of the State of Alaska, an area which encompasses Prudhoe Bay and much of the land over which TAPS was constructed. The Arctic Slope Regional Corporation is one of 12 corporations

and the ICC's Bureau of Investigation and Enforcement. The Commission heard oral argument on June 27, 1977 [8] without making any formal evidentiary record.[8a]

established pursuant to ANCSA to conduct Native Alaskan business for profit. 43 U.S.C.A. § 1606. As compensation for the extinguishment of all aboriginal land claims, ANCSA granted Alaskan Natives fee title to approximately 400 million acres of land. 43 U.S.C.A. §§ 1611, 1613. All future revenues derived from that land will be the property of the Native people. 43 U.S.C.A. § 1606. ANSCA further provided for cash compensation of $962,500,000 to be paid over a period of years, a portion of which is to be derived from a 2% royalty on the wellhead value of all crude oil production in Alaska under state or federal leases. 43 U.S.C.A. §§ 1605, 1608. Thus, on their theory, the Native Alaskans' revenue is inversely related to the rise in TAPS tariffs.

[8] Recognizing the importance of the controversy, the ICC, in an extraordinary move, bypassed its usual procedural channels and took the suspension proceeding for its own direct consideration. While Commission regulations consider a protest and petition to suspend "as addressed to the discretion of the Commission" 49 C.F.R. § 1100.42 (1976), suspension protests and petitions are in practice routinely referred to the Board of Suspension. See 49 C.F.R. § 1100.200 (1976); Mobil Memorandum In Support of Application for Interlocutory and Temporary Restraining Order at 7; Reply of Interstate Commerce Commission in Opposition To Application For Interlocutory Injunction and Temporary Restraining Order at 4. The Commission heard arguments for one full day before issuing its suspension order.

Although a transcript of that hearing was made, the papers on file with the Court contain only excerpts from that proceeding. *E.g.*, Appendix A to Justice Department's Memorandum in Support of Motion to Dismiss; Appendix C to Memorandum of the State of Alaska in Opposition to Application for Interlocutory Injunction and Temporary Restraining Order. Also, the tariff filings themselves, with any supporting submissions, were not filed with the Court. On file with the Court, however, were several exhibits such as "Reply of Exxon Pipeline Company to Protests" (Appendices of Exxon Pipeline Company for Expedited Consideration or in the Alternative Stay Pending Review) and statements by C. R. Thompson, Controller-Treasurer of Mobil Alaska Pipeline Co. (Appendix D to Memorandum of the State of Alaska in Opposition to Application for Interlocutory Injunction and Temporary Restraining Order).

[8a] The briefs of the parties contained references to the information which the ICC apparently had before it during the suspension

The ICC's June 28 Order [9] instituted an investigation into the lawfulness of the tariffs pursuant to 49 U.S.C.A. §§ 15(1)[10] and 15(7).[11] The rates filed were suspended

proceeding. Such information included: (i) written representations in the form of protests from the State of Alaska, the Arctic Slope Regional Corporation, the United States Department of Justice, and the Bureau of Investigations and Enforcement of the ICC (Memorandum of the State of Alaska in Opposition to Applications for Interlocutory Injunction and Temporary Restraining Order at 2); (ii) verified statements offered by the TAPS Carriers in support of their rate calculations (Memorandum in Support of Exxon Pipeline Company's Motion for Expedited Consideration or, in the Alternative, for a Stay Pending Review at 46) [hereinafter Exxon Memorandum]; (iii) statement of Dr. Michael J. Ileo (submitted with Alaska's protest) which discusses the unreasonableness of carriers' rate calculations (Exxon Memorandum at 46); (iv) sworn testimony of Raymond B. Gary, a Managing Director of Morgan Stanley & Company, and Dr. Ezra Solomon, Dean Witter Professor of Finance at the Graduate School of Business of Stanford University, filed in Ex Parte No. 308, *Valuation of Common Carrier Pipelines* (Exxon Memorandum at 38); (v) letters sent from Mobil Alaska Company to ICC (obtained under the Freedom of Information Act, 5 U.S.C.A. § 552) which deal with such topics as TAPS start-up, depreciation, dismantling and restoration, anticipated salvage, and estimated annual operating expenses (Memorandum of the State of Alaska in Opposition to Applications for Interlocutory Injunctions and Temporary Restraining Order at 25-6); (vi) calculation of the rates of return on valuation for 90 regulated pipelines for the years 1970-72, made by George M. Stafford, former ICC Chairman (Exxon Memorandum at 40-1); and (vii) a variety of carrier-provided data concerning the normal traffic volume for the beginning years of TAPS, costs, depreciation charges, and investment calculations (ICC June 28 Order at 5-7 and Appendices to Order).

[9] The Order is set forth as an Appendix to this opinion.

[10] 49 U.S.C.A. § 15(1) reads in pertinent part as follows:

> "Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation

of persons or property, as defined in section 1 of this title . . . is or will be unjust or unreasonable . . . the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged . . . and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be. . . ."

[11] 49 U.S.C.A. § 15(7):

"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further

for seven months without prejudice to the filing of interim rates during the suspension period. The Commission additionally authorized the filing, upon not less than one day's notice, of interim rates which were not to exceed certain levels, subject, however, to the condition that the carriers keep account and that (i) the interim tariffs contain a refund provision to the effect that if the new rates exceed those subsequently authorized or prescribed by the ICC, the carriers will refund the excess with interest; and (ii) the carriers file a similar refund provision applicable to the original proposed rates. The Order thus had the following effect on the carriers' proposed rates per barrel:

	As Filed by TAPS Owners	Authorized By Order [12]	Reduction
Amerada Hess Pipeline Corp.	$6.44	$4.85	$1.59
Arco Pipe Line Company	6.04	4.91	1.13
BP Pipelines Inc.	6.35	4.68	1.67
Exxon Pipeline Company	6.27	5.10	1.17
Mobil Alaska Pipeline Company	6.31	4.84	1.47
Phillips Alaska Pipeline Corp.	6.22	Not Yet Acted Upon	
Sohio Pipe Line Company	6.16	4.70	1.46
Union Alaska Pipeline Company	6.09	4.89	1.20

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order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. . . ."

[12] According to the ICC, these rates reflect a 10% rate of return on tentative valuation. See pp. 4-8 of the ICC Order, and Appendices 2-5 thereto.

The carriers estimate that the Order will result in an irretrievable $340 million loss over the seven-month suspension period.

The suspension left the pipeline company without tariffs on file, and they are forbidden by § 6(7) of the Act to engage or participate in the transportation of oil unless they file new tariffs. The carriers thus had two alternatives open to them. They could file new tariffs within the ICC guidelines or they could shut down the TAPS system for the seven-month suspension period. Unhappy with either choice, the pipeline companies filed their petitions and motions and the United States moved to dismiss.[13] This Court heard oral argument on July 19, 1977.

The major issues raised by the parties are (i) whether we have jurisdiction to review the ICC order; (ii) whether the Commission has the authority under 49 U.S.C.A. § 15 (7) to suspend the first and only ("initial") rate of a carrier; (iii) whether as part of a purported suspension order the ICC may prescribe or suggest optional maximum interim rates; (iv) whether the ICC's order authorizing the filing of maximum interim rates without a full hearing amounted to a prescription of rates within the meaning of 49 U.S.C.A. § 15(1); (v) whether the Commission acted outside its statutory authority in ordering the refund provisions in the tariffs; (vi) whether the Commission's action was arbitrary, capricious or constituted an abuse of discretion; (vii) whether the maximum interim rates authorized were confiscatory in violation of the Fifth Amendment.

1. Reviewability and the authority of the Commission

The government has moved to dismiss the petitions for review on the ground that this court has no jurisdiction

[13] *See* note 1, supra.

to review suspension orders of the ICC issued pursuant to 49 U.S.C.A. § 15(7). True, courts do not have jurisdiction to review ICC suspension orders. Congress has committed the decision to suspend or not to suspend proposed rates exclusively to the discretion of the Commission. *U.S.* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963); K. Davis, ADMINISTRATIVE LAW TREATISE 966 (1970 Supp.). As a panel of this circuit noted:

> The Interstate Commerce Commission . . . is vested with power to suspend, at its discretion, for a period of seven months, rates filed with it pending hearing and decision on their lawfulness. 49 U.S.C. § 15(7). The existence of this power in the ICC, it has been held, evinces the deliberate decision of Congress to extinguish judicial power to grant any injunction which interferes with the Commission's discretionary decision to suspend rates filed with it at anytime before the Commission finally determines the lawfulness of the rates.

Texas v. *Seatrain International*, 518 F.2d 175 at 178 (CA5, 1975). But the rule of unreviewability presupposes an affirmative answer to a preliminary inquiry into whether the Commission has acted within the authority granted to it by § 15(7). A suit to enjoin a suspension order may be entertained if the complaint shows that the agency lacked the basic statutory authority to issue such an order. *Great Western Packers Express, Inc.* v. *U.S.*, 246 F.Supp. 151, 154 (D.Colo., 1965) (three-judge court); *Long Island Railroad Co.* v. *U.S.*, 193 F. Supp. 795, 800 (E.D.N.Y., 1961) (three-judge court).

Section 15(7) gives the ICC the power to suspend "any schedule stating a new individual or joint rate, fare, or

charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge" for a period not to exceed seven months, and to order an investigation and full hearings on those new charges. The above language has no plain meaning. The term "new" can refer to both changed and initial rates or only changed rates. The statutory history of the Mann-Elkins Act (1910), which added § 15(7) to the Interstate Commerce Act, yields little insight on whether the ICC is empowered to suspend initial rates since no one seems to have debated or even discussed this specific question. However, our examination of statutes modeled on § 15(7) and of the legislative policy underlying that section convinces us that it was Congress' intention that the Commission have the power to suspend initial as well as changed rates.

Section 15(7) has served as the prototype of other agency rate suspension provisions in the Interstate Commerce Act and in other regulatory acts as well. In many of these acts, when Congress has wished to exclude initial rates, either in part or across the board, it has done so in specific language. In the Interstate Commerce Act itself, there are provisions modeled on 49 U.S.C.A. § 15(7) giving the ICC authority to suspend new rates, proposed by motor carriers, 49 U.S.C.A. § 316(g), by water carriers, 49 U.S.C.A. § 907(g)(i), and by freight forwarders, 49 U.S.C.A. § 1006(e). Each of these provisions contains a grandfather clause exempting certain initial rates from suspension. If initial rates were not covered there would have been no need for the grandfather clauses. Another example is 49 U.S.C.A. § 1482(g), which gives the Civil Aeronautics Board suspension powers similar to those granted to the ICC with one significant difference: it specifically provides that "[t]his subsection shall not apply to any initial tariff filed by any air carrier." Thus, we conclude that if Congress had wished to exempt initial tariffs from the purview of § 15(7) it would have

done so specifically, and that Congress' omission to specially exempt initial rates in this section indicates its intent that initial rates be subject to the ICC's § 15(7) suspension powers.

The conclusion that initial rates are covered by § 15(7) is consistent with the legislative policy underlying that section. Section 15(7) evidences a belief on the part of Congress that the normal hearing and reparation processes of the ICC are not sufficient to protect the public against potentially excessive charges. The need for this protection is no less in the case of initial rates than in the case of changed rates. Absent a specific legislative decision that initial rates are not covered, it would be illogical to assume that Congress intended to leave such a gap in the legislative scheme.

2. The suggested interim rates

The petitioners challenge the action of the Commission with respect to suggested interim rates. They point out that § 15(7) contains no provisions for establishing interim rates and that, in any event, rates can only be prescribed after full hearings. See 49 U.S.C.A. § 15(1). The Commission's position is that it has not actually fixed a rate but, in a situation of urgent national interest and as an incident of its power to suspend, it has given advance indication of the maximum rates with respect to which—if the carriers elect to file them—the Commission will not exercise its power to suspend.

The Commission Order refers to "interim rates," but baldly describing the issue as the power of the Commission to set interim rates is misleading. As we have held, the Commission had the power to unconditionally suspend the proposed tariffs, leaving the carriers without any tariffs but free to file new tariffs if they wished, which would be subject to new exercise of the Commission's power to suspend. The ICC chose not to ex-

ercise to its full limits the drastic but available power of unconditional suspension and instead announced that if petitioners would file interim tariffs at or below Commission-announced ceilings the Commission would not unconditionally suspend the tariffs originally filed.

The petitioners maintain that the § 15(7) power to suspend is an all or nothing instrument. We think not. The Commission may elect to exercise its power less than fully, or putting it another way, may partially waive the suspension power. We are guided by the Supreme Court's decision in *U.S.* v. *Chesapeake & Ohio Railroad Co.*, 426 U.S. 500, 96 S.Ct. 2318, 49 L.Ed.2d 14 (1976) ("*Chessie*"). In *Chessie* the ICC suspended a carrier-proposed tariff increase but at the same time authorized the railroads to refile, incorporating conditions which would assure that the additional revenue would be expended on capital improvements and deferred maintenance. The Supreme Court upheld the refiling provision as directly related to the ICC's suspension power. The Court noted that the ICC could simply suspend the originally proposed rates for the full statutory seven-month period but that instead "it pursued a more measured course and offered an alternative tailored far more precisely to the particular circumstances presented." 426 U.S. at 514, 96 S.Ct. at 2325, 49 L.Ed.2d at 23. *Chessie* establishes the right of the ICC to choose to exercise its suspension power to less than its outer limits in order to meet the needs of a particular situation. The ICC's authorization to file interim rates was the type of "more measured course" or partial waiver which the Supreme Court approved in *Chessie*.

Moss v. *CAB*, 430 F.2d 891 (C.A.D.C., 1970), relied on by the petitioners, is not to the contrary. In *Moss* the Court of Appeals for the District of Columbia held that the Civil Aeronautics Board (CAB) could not, after ex parte meetings with the air carriers, "suggest" a comprehensive rate formula that it would not suspend or investigate. *Moss* involved what for all intents and purposes was the establishment of permanent rates. By attempting to establish a permanent rate structure through its suspension power the CAB took actions which went beyond the strongest action it could have taken under its suspension power, i.e., suspending the proposed increases for 180 days. 49 U.S.C.A. § 1482(g). In essence what the CAB attempted to do in *Moss* was to waive a right it did not have. In contrast, the ICC's suggestion of interim rate ceilings in the present case is an action which is more restrained, or measured, than its right to unconditionally suspend the original tariff for a period of seven months. If in seven months the ICC has not completed its investigation, the carriers will be free to levy their originally filed charges subject to a refund order.

Also, in *Moss* the practical effect of the CAB's actions would have been to immunize the suggested permanent rate structure from judicial review.[14] In the present case the ICC has not sought to shield its final decision from judicial review. Instead the Commission has commenced hearings on the original rates proposed by the petitioners, and any eventual final order stemming from those hearings is subject to judicial scrutiny.

In a case involving initial rates, if the ICC could not couple its suspension order with a statement of maximum allowable interim ceilings, the Commission would be forced to allow initial rates to go into effect, even if facially outrageous, subject only to lengthy investigation and hearing procedures, or to watch a possibly vital public service close down for want of a rate schedule.

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[14] Judge Leventhal in his concurring opinion in *Continental Airlines, Inc.* v. *CAB*, 173 U.S.App.D.C. 1, 522 F.2d 107 at 131 (1975) (en banc), emphasized the evasion of judicial review as the key to *Moss*.

We doubt the Congress would have intended that the Commission face that Hobson's choice.

The use of interim rates as a condition to a suspension order is not unprecedented. In I & S Docket No. 8645, Orders (May 27, 1971, and June 29, 1971) the Commission ordered that increased lighterage charges proposed by the Penn Central Railroad be suspended but allowed the company to file interim rates containing additional charges not to exceed 50% of those initially proposed. The ICC's orders also required that Penn Central maintain an account from which refunds could be made to the extent that the proposed tariffs could not be justified to the Commission. In *Port of New York Authority* v. *U.S.*, 451 F.2d 783, 785-88 (CA2, 1971), the Second Circuit held that the Order was unreviewable and that federal courts lacked subject matter jurisdiction over an action challenging the Order.

We conclude that the ICC as corollary to its suspension power had the power to set out allowable rate ceilings for the seven-month period which, if filed, it would not suspend. Therefore, this aspect of its Order is not reviewable by this court.

3. The refund provisions

As a condition precedent to the interim rates which the Commission stated it would accept, the Commission required the carriers to establish refund provisions for use in the event that either the interim rates or the originally filed tariffs [15] or both should be found to be excessive.

With respect to this exercise of power for the seven-month period, like the power to suggest the interim rates

[15] As we noted previously, if the Commission does not complete its investigation within seven months from the date of its suspension Order, the carriers' originally filed rates automatically go into effect

themselves, we find this is a valid corollary to the suspension power, which we lack jurisdiction to review. *See Port of New York Authority* v. *U.S.*, *supra.* We are less certain of the Commission's power to require the carriers to establish refund provisions with respect to the originally filed rates. However, we view this exercise of power as corollary to the power to suspend. Thus, insofar as the Commission's order reaches beyond the seven-month period, we are guided by *Chessie*, where the condition upheld by the Supreme Court was permanent.[16]

4. Arbitrariness and confiscation

The petitioners assert that the Commission action was an abuse of discretion and that the interim rate ceilings are so grossly insufficient that they are confiscatory in violation of the Fifth Amendment. Restating, we understand these contentions to be that even if the Commission is authorized by § 15(7) to act with respect to the subject matter, its exercise of power departed from constitutional standards. Assuming that we can review the Commission Order through these constitutional entry points the record before us gives no basis upon which we can act.

All motions to intervene are GRANTED. All motions for stay, suspension, injunction and other forms of interlocutory relief are DENIED. The motion of the United States to dismiss the petitions for review is GRANTED.

[Judge Roney's dissent is set forth in pp. 41a-50a of this Appendix].

[16] Under § 15(7) the Commission may require carriers to keep records and make refunds after the seven-month period has expired. This expressly conferred authority is not what we rely upon—it relates to "a proposed increased rate or charge."

RONEY, Circuit Judge, dissenting:

I respectfully dissent. The thesis of the Commission is that it has the unreviewable authority to suspend the pipeline's initial rate filing and, as an adjunct of that authority, it has the power to fix an unreviewable interim rate for the seven month period. The idea that the Commission can set an unreviewable rate without following the statutory ratemaking procedures runs counter to the entire plan established by Congress in the Interstate Commerce Act.

This is ratemaking. We should not hide from that fact. The Commission candidly admits that it is making an interim rate. To suggest that the rate is "voluntary," that no rate has been set by the Commission because theoretically the pipeline companies could accept the seven month stay and not file for the interim rate, exalts form over substance in a way rarely countenanced by this Court. The Court, the Commission, the pipeline companies, and all parties to this proceeding know that an interim rate will have to be accepted by the respondents. Without a filed tariff, no oil can flow. No one has made the slightest suggestion in brief or oral argument that it would be either in the public or private interest for the transportation of this oil to be suspended for seven months while the Interstate Commerce Commission determines whether or not the proposed tariff is reasonable and just. *See* 43 U.S.C.A. § 1651 et seq. (Supp. 1977). We are given to understand that the rate here under consideration does not affect the price of oil at the delivery point, or the eventual price to the consuming public. Any transportation cost adjustment affects only the wellhead price of oil. Although there is almost complete identity between the affiliates which own the pipeline and those who receive the wellhead price, there are some others involved, and the royalty to the State of Alaska and property owners varies with the wellhead price.

The argument that this is not ratemaking because it is only an interim and not a permanent rate loses force in numbers. The pipeline companies claim the difference between what they should get and what they will get under the interim rate could amount to $340,000,000. This sum is undoubtedly greater than the amount at stake in many permanent rates subject to ICC approval.

Although *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963), and *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), are cited for the proposition that the grant or denial of a suspension order is not reviewable, they in fact only hold that a court has no authority at all to suspend a rate and that an ICC refusal to suspend is not reviewable under any statutory standard. They do not hold that a suspension order is unreviewable under constitutional due process standards. I would think that a suspension order in this case, where the lack of any tariff would effectively close down the Alaska Pipeline for seven months, and would eliminate any method of transporting the oil from the Alaska oil fields for that period of time, would be reviewable on a constitutional due process standard.

We are not confronted, however, with just a suspension order. The order before us is schizophrenic. It is both a suspension order *and* a ratemaking order.

This is a situation never previously confronted by the courts. In most situations, if a new rate is submitted to the ICC and the agency chooses to suspend it, this merely means that the carrier involved will continue to charge the rates already in existence. Thus the ICC need not take further action to ensure that the carrier can stay in business and collect charges that at least at one time were assumed to be reasonable, during the seven month period. Here, however, the Commission

was faced with a brand new entity. The Trans-Alaska Pipeline System had no preexisting rate schedule when it filed its "new" rate with the ICC. Thus, after deciding to suspend the filed rate, the ICC was faced with a situation which left no legal rate in effect for the seven month period. Unwilling to allow the pipeline to shut down, the Commission had to promulgate what is a "second" order, a ratemaking order.

Rate setting orders are clearly reviewable under the statute. Therefore I would not review the possible legality of just a suspension order here. I would accept this case for what it is: an attempt by the Commission to do two things, the first of which it would not do had it not the power to do the second. There is no indication in anything before us that the Commission would suspend the proposed tariff if it could not set an interim rate. Thus I would not reach the constitutional considerations that might demand review of a suspension order alone in this unique situation. There is no indication that the Commission would follow such a course. Its claimed authority to do so becomes merely the theoretical exercise of power onto which it hangs its ability to set an interim rate.

So I would assume without deciding that the Commission has the power to suspend the initial rate and go to the question of whether it can set the interim rate in the manner done here. If the interim rate cannot stand, I would send the case back to the Commission for whatever action it wishes to take within the confines of its legal authority. If it chooses to suspend without an interim rate, then on review a court could consider whether that action alone under the circumstances of this case can withstand the due process requirements of the Constitution. Or, if it chooses to arrive at some interim rate through procedures that have some resemblance to the ratemaking procedures which Congress had

required, that too could be reviewed. However, I do not think that in order to decide the case before us we need to make any definitive decision as to whether an initial rate suspension alone, under the facts of this case, would be legal, or whether the Commission can ever set interim rates in connection with a rate suspension. All I would now hold is that the Commission has no authority to do what it did here.

United States v. *Chesapeake & Ohio R.R.*, 426 U.S. 500, 96 S.Ct. 2318, 49 L.Ed.2d 14 (1976), is the only controlling authority relied upon for the proposition that interim ratemaking is a necessary power under the suspension authority. In deciding that interim ratemaking is unreviewable, the majority opinion completely overlooks the fact that the Supreme Court considered the "conditions" imposed on the proposed tariff there to be reviewable.

> In this Court, Chessie has argued that . . . the application of the Commission's action to it is arbitrary and capricious. . . . Since the District Court held that the Commission did not have the power to impose conditions on the refiling of the tariff, it did not address this question. Chessie, if it chooses, may raise the matter on remand in the District Court.

426 U.S. 515, 96 S.Ct. at 2326. To distinguish the point on the ground that in *Chessie*, the rate was permanent, must also distinguish the case beyond support for the proposition espoused in the case at bar.

This case is factually and legally different from *Port of New York Authority* v. *United States*, 451 F.2d 783 (2d Cir. 1971), relied upon by the majority. There the initial decision had been made to suspend the effective date of the proposed increase in tariffs. There was a tariff in effect after suspension, one which had already

been determined to be reasonable either through Commission action or lack of complaint. The suspension order was concededly within the sole discretion of the Commission, and *all* that was involved was timing. The Commission offered to let the carrier collect an interim increase, if it chose to do so. For two reasons that case is not helpful here.

First, in that case, there was a good faith suspension order of the rate increase which did not cut off services. Here there is *no* indication that the Commission would suspend the tariff and consequently cause a seven month delay in service. In fact, we are told that in oral argument before the Commission, the director of the Commission's Bureau of Investigation and Enforcement indicated the owners of the pipeline might be subject to civil or criminal penalties if they did not file for these "voluntary" interim rates. Such view would dispel any thought that the public interest required a rate suspension. This is pointed out not to suggest that a suspension order would be reviewable under the statutory public interest standard, but only to emphasize that the Commission has made no such decision upon which to hang the *Port of New York Authority* holding.

Second, the pipeline companies' choice is not whether to adhere to present rates for seven months, or accept an interim increase, as was the case in *Port of New York Authority*, but whether to do business at all, or accept an interim rate. This does not make acceptance or rejection of the interim rate the viable choice that was available in that case.

The interim rate being reviewable, the next question is whether it can stand. Even if the Commission is permitted some leeway, and allowance is made for the fact that it "pursued a more measured course and offered an alternative tailored far more precisely (than a simple suspension) to the particular circumstances presented," *Chessie*, 426 U.S. at 514, 96 S.Ct. at 2325, the manner of arriving at the interim rate was beyond the most liberal reading of its statutory authority.

Congress has set well-established limits on the ICC's power to make rates. First, historically, the ICC did not have ratemaking power. It could set aside a rate as being unreasonable, but the Supreme Court found no implied power to set a reasonable rate. *ICC* v. *Cincinnati, New Orleans & Texas Pacific Ry.*, 167 U.S. 479, 17 S.Ct. 896, 42 L.Ed. 243 (1897). Only nine years later did Congress amend the Act to give the ICC power to set maximum rates, Act of June 29, 1906, ch. 3591, § 4, 34 Stat. 589, and not until 1920 was it given power to set minimum rates, Act of Feb. 28, 1920, ch. 91 § 418, 41 Stat. 484.

Second, the ICC has the power to set rates *only after* it has determined that a proposed rate is unreasonable. That principle has been reiterated in several cases which indicate that it is the carriers who have the right to propose initial rates. *ICC* v. *Louisville & Nashville R. R.*, 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431 (1913) ("Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order." 227 U.S. at 92, 33 S.Ct. at 187). *See also New York* v. *United States*, 331 U.S. 284, 67 S.Ct. 1207, 91 L.Ed. 1492 (1947); *United States* v. *Illinois Central R. R.*, 263 U.S. 515, 522, 44 S.Ct. 189, 68 L.Ed. 417 (1923); *Southern Pacific Co.* v. *ICC*, 219 U.S. 433, 31 S.Ct. 288, 55 L.Ed. 283 (1911); *ICC* v. *Chicago Great Western Ry.*, 209 U.S. 108, 118-119, 28 S.Ct. 493, 52 L.Ed. 705 (1908).

Third, a proposed rate can be found unreasonable *only after* a full hearing. *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 284 U.S. 248, 262, 52 S.Ct. 146, 150, 76 L.Ed. 273 (1932) ("The legal standards governing the action of the Commission in determining the reasonableness of the rates are unaltered. In the discharge of its duty, a fair hearing is a fundamental requirement.") The courts have consistently held that a finding by the ICC of unreasonableness of the rate proposed by the carrier must be supported by substantial evidence on the record as a whole. *Atchison, Topeka & Santa Fe Ry. Wichita Board of Trade*, 412 U.S. 800, 806, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973); *Western Paper Makers' Chemical Co.* v. *United States*, 271 U.S. 268, 271, 46 S.Ct. 500, 70 L.Ed. 941 (1926); *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 562, 39 S.Ct. 375, 63 L.Ed. 772 (1919); *Archer Daniels Midland Co.* v. *United States*, 301 F.Supp. 328 (D. Minn. 1969) (3-judge court); *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 282 F.Supp. 430, 434 (D. Kan. 1968) (3-judge court).

Last, the ICC can establish a rate only after a *full evidentiary hearing. Atchison, Topeka & Santa Fe Ry.* v. *United States*, 284 U.S. 248, 262, 52 S.Ct. 146, 76 L.Ed. 273 (1932); *ICC* v. *Louisville & Nashville R. R.*, 227 U.S. 88, 93, 33 S.Ct. 185, 57 L.Ed. 431 (1913). That hearing requirement is not satisfied by the "brief and informal hearing" which accompanies a suspension order. *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 672, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963). The case for strict enforcement of the hearing requirement is particularly strong because this rate applies to so few companies, and the administrative inconvenience of multiple parties which sometimes justifies lowered procedural standards is not present. *Compare Londoner* v. *Denver*, 210 U.S. 373

28 S.Ct. 708, 52 L.Ed. 1103 (1908) (individual property assessment without hearing invalid) with *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372 (1915) (city-wide revaluation does not require individual adjudication). Even in the multi-party rate cases administrative hearings have withstood attack only when the agency granted adequate notice and opportunity to comment both on the original rate proposal and on the comments made by others. *See Shell Oil Co.* v. *FPC*, 520 F.2d 1061, 1074-1076 (5th Cir. 1975), *cert. denied sub nom., California Co.* v. *FPC*, 426 U.S. 941, 96 S.Ct. 2660, 49 L.Ed.2d 394 (1976).

In this case where is the finding of unreasonableness of the proposed rate on an evidentiary record, and where is the record to support the interim rate? The Commission readily admits that it cannot support either finding by record evidence.

But procedural unfairness is only the beginning of the arbitrariness in this case. The real difficulty, and the problem that makes the procedural shortcuts so detrimental to the petitioners, is that Congress through the Act has provided a reasonable way to protect *all* parties in this proceeding against the effect of error in the proposed rate, but the Commission has, without offer of justification, ignored it in the proposed interim tariff. If the rate is determined to be too high, the carriers may be forced to refund, with interest, 49 U.S.C.A. § 15(7) (Supp. 1977), or pay back as damages, with costs and attorneys' fees, 49 U.S.C.A. § 8, an overcharge collected prior to rate determination. In other words, the parties overcharged can be made whole. If the interim rate is too low, however, the ICC program provides no means whatsoever for the pipeline to recover the difference between what it was required by the Government to charge, and what that same Government later decides would

have been a reasonable rate. To have a way to protect all interests, and not take it, and subject one party to the possibility of irreparable loss, is impermissible under even the most deferential standard of judicial review.

The complainants argue that a system of refunds would produce justice at the price of delay. Even justice delayed, however, is preferable to justice forever denied. At oral argument, Commission's counsel suggested no harm had been done because the interim rate is the highest rate that could reasonably be established for the pipeline. That statement constitutes a gross prejudgment of what the ICC will do, and overlooks entirely the reviewable nature of the Commission's ultimate ratemaking action. Without a sufficient record to support a finding of anything at all, and with serious questions about the rate of return, the treatment of inflation, and allowances for depreciation, counsel would have this Court predict what Commissioners, who may not be in office now, will do on the evidence presented them, and what a court of judges, who may not be in office now, will do on review of whatever those Commissioners do.

Nor can this Court sustain the interim rate by obeisance to the expertise of the Commission. Only after a full hearing upon complaint made does the law give weight or significance to the opinion of the Commission. *Atlantic Coast Line R. R.* v. *ICC*, 194 F. 449 (Commerce Ct. 1911). The expertise of the Commission can only be relied upon after it has exercised its expert judgment on the record before it. *See* Pedersen, *Formal Records & Informal Rulemaking*, 85 Yale L.J. 38 (1975).

Hence I would hold that the Commission had no authority to set in the way it did the interim rate which was forced upon the carriers. I would set aside that proposed interim rate for these reasons: *first*, the Commission did not even attempt to follow congressionally man-

dated procedures for setting rates; *second*, without some specific finding of unreasonableness in the proposed rate, it appears arbitrary not to follow the statutory plan by which all parties could be protected against any eventual rate determination, and to follow a course which would cause irreparable damage to the pipelines if their position is eventually sustained; *third*, the interim tariff itself appears to be based on a rate of return more akin to that of corporate bonds than to the speculative risks of equity capital, a rate arrived at without sufficient supportive evidence concerning the speculative nature of these investments or the appropriate rate therefor.

I would set aside the Commission's Order of June 28, 1977 and remand the case to the Commission for further consideration consistent with its statutory authority.

Judgment, Issued as Mandate September 8, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted In Printing]

Before BROWN, Chief Judge, GODBOLD and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petitions of Mobil Alaska Pipeline Company, BP Pipelines Inc., Exxon Pipeline Company and Arco Pipeline Company for review of an order of the Interstate Commerce Commission, and was heard on the motion papers on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petitions for review of an order of the Interstate Commerce Commission in this cause be, and the same are hereby dismissed. All motions to intervene are GRANTED. All motions for stay, suspension, injunction and other forms of interlocutory relief are DENIED.

July 29, 1977

Issued as Mandate: Sept. 8, 1977

A true copy

Teste: Edward W. Wadsworth
Clerk, U. S. Court of Appeals, Fifth Circuit

/s/ CLARE F. SACHS
Sept. 8, 1977

Order of Court of Appeals Denying Motions of Exxon Pipeline Co. to Stay Mandate and Stay Order of Inter-State Commerce Commission, September 8, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted In Printing]

Before BROWN, Chief Judge, and RONEY, Circuit Judge*.

BY THE COURT:

Exxon Pipeline Company has moved for a stay of the mandate of this Court pending its application for a writ of certiorari to the Supreme Court for review of our decision of July 29, 1977 in Mobil Alaska Pipeline Co. v. United States, etc. [Nos. 77-2392, 77-2412, 77-2421 and 77-2437 at 5208]. Such a stay is unnecessary for timely petition for certiorari. Therefore, it is ordered that Exxon's motion for a stay of mandate is DENIED.

Exxon additionally has moved for a stay of the June 28, 1977 Interstate Commerce Commission Order pending application to the Supreme Court for a writ of certiorari for review of our July 29, 1977 decision. This motion seeks essentially the same relief previously sought before this panel as to which this Court has ruled on the merits. Because of the action of the panel, and for the reasons stated in the majority opinion, Exxon's motion for stay of the ICC order is also DENIED.

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* Judge Godbold, a member of the panel, being absent from the United States, did not participate in this Order.

Order of Court of Appeals Denying Petition of BP Pipelines Inc. for Rehearing, Sept. 8, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted In Printing]

Before BROWN, Chief Judge, and RONEY, Circuit Judge*.

BY THE COURT:

BP Pipelines Inc. has petitioned for rehearing of our July 29, 1977 decision in Mobil Alaska Pipeline Co. v. United States, etc. [Nos. 77-2392, 77-2412, 77-2421 and 77-2437 at 5208]. We believe that the petition presents substantially nothing that the panel did not pass on in its prior decision. In view of the severe time problems involved in the operation of the Trans Alaska Pipeline and the parties' need to expedite Supreme Court review, the Court is of the opinion that nothing further would be accomplished by rehearing.

Therefore, to enable the parties to seek review before the Supreme Court without further delay, it is ordered that BP's Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the Petition for Rehearing En Banc is DENIED.

* Judge Godbold, a member of the panel, being absent from the United States, did not participate in this Order.

Order of Interstate Commerce Commission Denying Petitions for Reconsideration, etc., Sept. 27, 1977.

INTERSTATE COMMERCE COMMISSION

ORDER

INVESTIGATION AND SUSPENSION
DOCKET NO. 9164[1]

TRANS ALASKA PIPELINE SYSTEM
(Rate Filings)

By orders of June 28, 1977,[2] and July 19, 1977,[3] we instituted investigations into the lawfulness of initial tariff rates filed by eight pipeline companies for transportation of crude petroleum over the Trans Alaska Pipeline System. We also suspended the operation of those rates for periods of seven months and authorized the filing of lower interim rates for use during the suspension period. Petitions for reconsideration of various aspects of our orders have been filed both by the pipeline companies and by parties challenging their tariffs.[4]

On petition, one or more of the carriers contend: (1) that higher interim rates should be authorized on the basis that traffic volume during the suspension period will aver-

1. Embraces Investigation and Suspension Docket No. 9164 (Sub-No. 1), Trans Alaska Pipeline System (Rate Filings); Docket No. 36611, Trans Alaska Pipeline System (Rules and Regulations); and Docket No. 36611 (Sub-No. 1), Trans Alaska Pipeline System (Rules and Regulations).

2. I. & S. No. 9164, affecting Amerada Hess Pipeline Corporation, Arco Pipe Line Company, BP Pipelines, Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Corporation, Sohio Pipe Line Company, and Union Alaska Pipeline Company.

3. I. & S. No. 9164 (Sub-No. 1), affecting Phillips Alaska Pipeline Corporation.

4. The petitions and replies to them are identified in the appendix to this order.

age less than the 1.2 million barrels a day assumed in the Commission's orders; (2) that the yearly charges recognized for removal and restoration costs should be increased to account for inflation and taxes; (3) that a greater percentage return on valuation should be allowed; and (4) that the suspension periods for Phillips and Amerada Hess should be modified. These contentions will be discussed individually.

In our order of June 28th, we assumed that the carriers' normal traffic volume, or "throughput," for the beginning years would be 1.2 million barrels a day. We used this assumption in converting the carriers' total costs to per-barrels costs, for the purpose of finding suitable interim per-barrel rates. The carriers now seek a decrease in the assumed throughput, which would result in higher costs per barrel, and thus, higher interim rates.

The carriers do not deny that 1.2 million barrels is the amount that they reported to the Commission as their expected normal daily throughput (prior to any future expansion of pipeline capacity). However, they now take the position that, in authorizing an interim rate for a seven-month suspension period, the Commission should consider only the traffic volume expected during that period. They note that throughput during the suspension period will be lower than normal volume for two reasons: (1) there is an expected lower-volume startup period, variously estimated to last from several weeks to as long as four months, and (2) the occurrence of a fire at Pump Station 8 has imposed a substantial additional delay on the attainment of normal traffic volume.

We find insufficient basis in the petitions for modifying the throughput assumption upon which the interim rates were computed. At the time of our previous orders, we

were indeed aware that there would be a startup period in which throughput would be below normal. Nevertheless, we did not consider it suitable to use the throughput level of a short initial period, such as the suspension period, as the basis for finding per barrel costs. The interim rates were intended to be preliminary estimates of maximum lawful rates for the services proposed in the tariff. Therefore, the cost data and the throughput assumption that we used were related to expected typical conditions of pipeline operation. The petitions shown no reason to conclude that the throughput figure used was erroneous on the basis of the data previously before the Commission.

Nor do we believe that the carriers' assertion of changed circumstances resulting from the pump station fire warrants a modification of the throughput assumption. The carriers contend that this accident will have a severe and rather long-lasting effect on throughput. In some of the petitions, it is estimated that throughput will not exceed 800,000 barrels a day during the suspension period, and may be much less. Phillips and Exxon report an estimate that daily volume will range from 617,000 barrels in August 1977 to 690,000 barrels in December 1977; Phillips further asserts that the 690,000 barrel level may not be exceeded until the third quarter of 1978.

There are two reasons why these assertions do not warrant a change in our throughput assumption. First, the risk of setbacks such as the pump station fire was taken into account when we chose the rate of return on valuation to be allowed in computing interim rates. Second, the carriers have provided no data and little explanation to support their projections of lower throughput. We do not know, for example, how much daily throughput capacity was lost specifically from the destruction of pump station

8; when pump station 8 is expected to be restored to service; why this amount of time would be required; what other factors enter into the carriers' throughput estimates; what means other than the rebuilding of pump station 8 are available to increase the throughput; whether such means will be employed, and to what effect.

In short, our prior orders were made in recognition both of an expected initial period of low throughput and of the risk of operating problems. The information subsequently submitted by the carriers is insufficient to establish circumstances very different from what we previously contemplated. Therefore, the request for use of a different throughput assumption in computing authorized interim rates will be denied.

Turning to the carriers' other contentions, the question of the appropriate allowance for removal costs was fully considered in our previous orders, as was the question of the appropriate rate of return standard for use at the suspension level. No warrant for modification of those conclusions has been demonstrated.

Amerada Hess and Phillips each seek modification of the termination dates of their suspension periods, which are later than the termination dates for the other six carriers. The tariff of Amerada Hess had a proposed effective date one day later than the others. Its tariff, like the others, was suspended for a period of seven calendar months. However, as a result of the differing lengths of the included calendar months, its suspension period extends two days beyond the others. It seeks to have its suspension period shortened by one day, to have the same number of days' duration as the others.

Phillips' tariff was filed with an effective date 20 days later than the others, and therefore its suspension period

expires 20 days later. It seeks to have its suspension period shortened to expire on the same day as the others.

These requests for shortened suspension periods will be denied. The statutory seven-month suspension period was established by Congress for the protection of the public. Under present circumstances, we do not believe that the public should be deprived of that protection by the use of a shorter suspension period than the law allows. As an incidental matter, we note that, in the June 28th order, the omission of the words "and including" from the description of the last day of the suspension period for Amerada Hess was inadvertent, and will be corrected in this order.

In addition to respondents' petitions for reconsideration, Phillips also filed a request for stay of the suspension of its tariff rate. In this pleading it argues that a refund provision without suspension would avoid harm to it while adequately protecting shippers. Arguments of this nature were fully considered in the Commission's previous orders, and no reason for modification of those conclusions has been shown. The request for stay will be denied.

It is contended by the protestants in their petitions (1) that the Commission should extend the duration of its suspension period beyond the specified seven months to the full period of the investigation, or seek legislative authority to do so; (2) that the suspension periods should be calculated from the date of readiness to provide for-hire service rather than from the effective dates of the tariffs; (3) that the authorized interim rates should be reduced on the basis of different conclusions regarding valuation, tax allowances, and depreciation charges; and (4) that refunds should be provided for at a 10 percent rate rather than at the lower rate resulting from the application of section 15 (8)(e) of the Interstate Commerce Act.

We find no basis in protestants' petitions for modification of the conclusions in our orders. The seven-month duration of the suspension period is clearly specified in section 15 (7) of the act, and is an expression of a carefully considered Congressional policy. Similarly, the date of commencement of the suspension period is clearly indicated in section 15 (7) as being the proposed effective date of the tariff. The proper standards of cost and investment for the authorized interim rate were fully considered in our previous orders, and no reason for modification of those conclusions has been demonstrated. Finally, we do not agree that refunds should bear interest at a rate equal to the authorized rate of return on valuation, where there is no similarity in the risk characteristics of the respective uses of funds. Protestants' petitions, accordingly, will be denied.

Finally, in its "response" to petitions for reconsideration, Sohio makes the request, not previously made by any party in these proceedings, that interim rates for all of the carriers be authorized at the same level. Such a request for affirmative relief in a reply pleading is neither authorized by our General Rules of Practice nor fair to the other parties. Moreover, the requested action would result in different standards of profitability being applied to different carriers, without demonstrated necessity or justification. The request is without merit, and will be denied.

It is ordered, That our order of June 28, 1977, in Investigation and Suspension Docket No. 9164 is clarified and corrected by the insertion of the words "and including" after the words "suspended to" in the next-to-last line of the first ordering paragraph.

It is further ordered, That the petitions for reconsideration and other requests for affirmative relief contained in

the pleadings described in the appendix to this order are denied.

Decided September 20, 1977.

H. G. Homme, Jr.
Acting Secretary

By the Commission.

(SEAL)

Commissioner Murphy, whom Commissioners Stafford and Macfarland join, dissenting in part:

In light of circumstances presented on petition, including the reduction in the estimated volume of oil moving per day, I believe that respondents should be allowed an increase of 42 cents per barrel in the interim levels. The interests of parties in opposition are adequately protected by the refund provisions applying to the interim level of rates.

With respect to the request by some respondents that the suspension period be altered, it should be pointed out that the Commission can establish a shorter period where appropriate. As a matter of convenience, an identical expiration date of the suspension period, namely January 29, 1978, would be most appropriate, again giving due consideration to the fact that the parties in opposition are protected by other refund provisions.

I would deny the petitions in all other respects.

ICC Order Denying Petitions for Reconsideration.

I. & S. No. 9164

APPENDIX

Description of Petitions, Replies, and Other Pleadings which are the Subject of the Present Order

Petitions

FILED:

July 8	Petition of Exxon Pipeline Company for Reconsideration
July 22	Supplement to Petition of Exxon Pipeline Company for Reconsideration
July 25	Petition of the Bureau of Investigation and Enforcement for Reconsideration and Statutory Clarification of the Commission's Suspension Orders
July 25	Petition of ARCO Pipeline Company for Reconsideration
July 27	Petition of Union Alaska Pipeline Company for Administrative Review
July 27	Petition of Amerada Hess Pipeline Corporation for Reconsideration or Clarification
July 27	Petition of Mobil Alaska Pipeline Company for Reconsideration
July 28	Petition of Phillips Alaska Pipeline Corporation for Reconsideration and Revision
July 28	Petition of BP Pipelines Inc. for Reconsideration and for Permission to File a Revised Rate
July 28	Petition of the State of Alaska for Reconsideration

Replies

July 18	Reply of the Arctic Slope Regional Corporation to the Petition of Exxon Pipeline Company for Reconsideration and to Application for the Stay of the Order Served June 28, 1977
July 19	Reply of the United States Department of Justice to the Petition of Exxon Pipeline Company for Reconsideration

ICC Order Denying Petitions for Reconsideration.

FILED:

July 28	Reply of the Bureau of Investigation and Enforcement to Petitions for Reconsideration filed by Exxon Pipeline Company and ARCO Pipeline Company
August 15	Joint Response to Petition of the Bureau of Investigation and Enforcement to extend the TAPS Suspension Periods
August 15	Joint Response to Petition of the State of Alaska for Reconsideration
August 16	Response of Sohio Pipeline Company to Petitions for Reconsideration
August 17	Consolidated Reply of the United States Department of Justice to Petitions of the Respondents for Reconsideration of the Commission's Orders of June 28, 1977 and July 18, 1977
July 28	Request for Stay of Suspension Order Dated July 19, 1977 (filed by Phillips Alaska Pipeline Corporation)
August 10	Opposition of the Bureau of Investigation and Enforcement to Phillip's Request for Stay of the I&S Order

Order of the Supreme Court Granting Application for Stay of ICC Order, October 20, 1977.

THURSDAY, OCTOBER 20, 1977
ORDER IN PENDING CASES

77-452, A-278 } MOBIL ALASKA PIPELINE CO. v. UNITED STATES

77-457, A-280 } EXXON PIPELINE CO. v. UNITED STATES

77-551, A-319 } BP PIPELINES, INC. v. UNITED STATES

The applications for stay, presented to Mr. Justice Powell and by him referred to the Court, are granted. The order of the Interstate Commerce Commission served June 28, 1977, in its Investigation and Suspension Docket No. 9164, Trans-Alaska Pipeline System (Rate Filings) is hereby stayed pending final disposition of the petitions for certiorari by this Court. The stays are conditioned upon applicants'-petitioners' agreement to keep account of the amounts collected under the proposed rates, as that term is used in the order in this matter issued by the Interstate Commerce Commission on June 28, 1977, and their agreement to refund any portion of the amounts collected under such rates by virtue of the stay which it is ultimately determined that they were not lawfully entitled to collect. The parties shall submit a proposed order embodying this undertaking to the Clerk of this Court within five days.

Mr. Justice Stewart and Mr. Justice Powell took no part in the consideration or decision of this order.

s/WEB

Order of the Supreme Court Further Effectuating Stay of ICC Order, November 14, 1977.

SUPREME COURT OF THE UNITED STATES

MOBIL ALASKA PIPELINE COMPANY v.
UNITED STATES ET AL.;
EXXON PIPELINE COMPANY v. UNITED STATES ET AL.;
BP PIPELINE, INC. v. UNITED STATES ET AL.; and
ARCO PIPELINE COMPANY v. UNITED STATES ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 77-452, 77-457, 77-551, 77-602, A-278, A-280, A-319, and A-376.

Decided November 14, 1977

On October 20, 1977, this Court stayed the order of the Interstate Commerce Commission served June 28, 1977, in its Investigation and Suspension Docket No. 9164, Trans-Alaska Pipeline System (Rate Filings) pending final disposition of the petitions for a writ of certiorari by the Court. To further effectuate that order, it is hereby ordered:

1. During the period the stay is in effect, commencing at 3 p. m. E. D. T., October 20, 1977, the following pipeline companies may collect their respective rates set forth in the tariffs that were suspended by the Interstate Commerce Commission in its order of June 28, 1977:

Amerada Hess Pipeline Corporation
Arco Pipeline Company
BP Pipeline Company
Mobil Alaska Pipeline Company
Sohio Pipe Line Company
Exxon Pipeline Company
Union Alaska Pipeline Company

2. The Federal Energy Regulatory Commission may proceed with its investigation of the rates set forth in said tariffs (FERC Docket No. (R78-1)) and in connection with that investigation may enter any appropriate orders not inconsistent with either this order or this Court's order of October 20, 1977.

3. During the period the stay is in effect, the pipeline companies shall keep account of all sums collected under the terms of said tariffs by virtue of the stay entered by this Court.

4. In the event certiorari is denied or it is otherwise ultimately determined that said pipeline companies were not lawfully entitled to collect a portion of the rates so collected, the pipeline companies shall refund such portion of said rates, with interest computed in accordance with section 15(8)(e) of the Interstate Commerce Act (49 U. S. C. § 15(8)(e)), to the persons entitled thereto without further order of this Court.

MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this order.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHAL joins, dissenting.

I initially joined in granting a stay in these cases. Upon further consideration, however, I am convinced that our stay was improvidently and precipitately issued and that it should now be dissolved.

Petitioners will be able to collect approximately $1.5 million per day by virtue of our stay that would not be collected were the suspension order of the Interstate Commerce Commission—which is the subject of petitions for certiorari

in this case[1]—to remain in effect. Because of the enormous sums of money that will be collected under our stay, over $100 million by January 28, 1978, when the suspension order of the ICC ends by its terms, the Court should be very clear before continuing this stay that it is really needed to protect petitioners and, more importantly, that the provisions of the stay adequately protect the interests of anyone who may be affected by this litigation. On the pleadings so far before us, I am not convinced that the Court is in a position to act with any such conviction.

First, with respect to the need for the stay, it is important to recognize that each petitioner comes before his Court in a dual capacity: Each is both a part-owner of the Trans Alaska Pipeline *and* a shipper of oil over the pipeline. Therefore some amounts which a petitioner would be prevented from collecting under the suspension order would immediately be recouped as extra profit to that petitioner in its capacity as a shipper. This is not to suggest that the gains would offset the losses with any precision, but only that the net losses may be sufficiently small that extraordinary equitable relief would not be appropriate.

My greater concern, however, is that the form of our stay may not adequately protect the ultimate consumers of oil shipped over the pipeline nor the interests of shippers or holders of royalty interests in the oil at Prudhoe Bay. Although the petitioners aver that the "landed price" of oil in the United States will not be affected by our stay and therefore that consumers of Alaskan oil will not face higher prices because of our order. I am not prepared to accept these unexplained statements on the record presently before us. Nor do I think the interest which petitioners are

1. For a discussion of the background of this litigation, see *Mobil Alaska Pipeline Co.* v. *United States*,——F.2d——(CA5 Nos. 77-2392, 77-2412, 77-2437. July 20, 1977).

Order of the Supreme Court Further Effectuating Stay of ICC Order.

today ordered to pay on any amounts ultimately ordered refunded is sufficient to reimburse shippers and royalty holders for the costs they may incur as a consequence of our stay. The only information we have as to what those costs may be is the statement of the Arctic Slope Regional Corporation[2] that it will have to borrow amounts equal to the royalties it would have had but for our stay at an estimated interest of 10%. Nonetheless, the Court today sets the interest to be paid on amounts refunded at the rate prescribed by 49 U.S.C.A. § 15(8)(e) (Supp. 1977), which applies only the railroad tariffs and is today somewhere below 7%.[3] Indeed, in adopting this rate, the Court today rejects what is to me the much more reasonable suggestion of the Solicitor General that the interest be set at 9%, which is the rate prescribed by the Federal Power Commission for tariff refunds from natural gas pipelines.[4]

For the reasons stated above, I would vacate the stay ordered by this Court on October 20, 1977, and order proceedings on the petitions for certiorari to be expedited. Barring this, I would have entered the form of stay order suggested by the Solictor General.

MR. JUSTICE BLACKMUN, dissenting.

I, too, conclude that the Court's stay was improvident. I agree with the conclusions reached by MR. JUSTICE BRENNAN and would vacate the stay issued by this Court on October 20, would accelerate consideration of the petitions for certiorari, and would follow the suggestions of the Solicitor General as to the rate of interest.

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2. Arctic Slope is the representative of the Inupiat Eskimos who have a claim to be paid 2% of the wellhead value of Alaskan crude oil up to a total of $500 million as consideration for their surrender of aboriginal land claims in the Prudhoe Bay area.

3. Section 15(8)(e) sets the rate of interest at "a rate which is equal to the average yield . . . of marketable securities of the United States which have a duration of 90 days."

4. See 18 CFR § 154.67(c)(2) (1977).

Order of Supreme Court Granting Petitions For Writs of Certiorari, November 28, 1977.

SUPREME COURT OF THE UNITED STATES

No. 77-452

MOBIL ALASKA PIPELINE COMPANY,

Petitioner,

v.

UNITED STATES, *et al.*

ORDER ALLOWING CERTIORARI. Filed November 28, 1977.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with Nos. 77-457, 77-551 and 77-602 and a total of one hour is allotted for oral argument.

Mr. Justice Stewart, Mr. Justice Blackmun and Mr. Justice Powell took no part in the consideration or decision of this case.